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The European Court of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence

By STEVEN A. BIBAS*

I. INTRODUCTION

Despite the silence of the European Community Treaties on human rights, the European Court of Justice (ECJ) has expounded a set of fundamental rights drawn from the laws and treaties of the Member States, moral principles, and the aims of the European Community (EC).¹ While some of the ECJ's jurisprudence has reduced national autonomy, national courts have generally accepted and applied the resulting rules of Community law. Most academics describe the Court's human rights policy as promoting justice and reassuring national courts as to their autonomy while preserving Community powers.² To do so, the ECJ has gone beyond the express provisions of the treaties to construe them purposively. Most commentators implicitly approve of this activism.³

However, one influential Danish scholar, Hjalte Rasmussen, sees the ECJ's activism as having weakened its credibility. Rasmussen assails the ECJ for overstepping its bounds and proposes a more limited judicial

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1. Though the salient differences are obvious, this Comment will use 'state,' 'nations,' 'federalism,' and 'Founders' in discussing both the U.S. and the EC.

2. See, e.g., Mauro Cappelletti, *Is the European Court of Justice Running Wild?*, 12 EUR. L. REV. 3 (1987).

3. For a good introduction to the history, structure, and politics of the EC, see TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (2d ed. 1988). For a more topical approach to EEC law, see DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* (2d ed. 1987). For a deeper look at human rights, see Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Community*, 61 WASH. L. REV. 1081, 1112 (1986).

role.⁴

This Comment summarizes Rasmussen's objections to the ECJ's activism and responds to them. Because Rasmussen draws illuminating parallels with the development of U.S. Supreme Court activism, this Comment also will use the American situation to show similarities in federal development but will defend the ECJ. Furthermore, this Comment will critique Robert Bork's book, *The Tempting of America*, which criticizes the U.S. Supreme Court's activism.⁵ Bork fears judicial discretion even more than Rasmussen. This Comment argues, however, that discretion does not equal complete textual license as long as judges heed textual and contextual constraints. By analyzing similarities between the EC and U.S. high courts and by discussing methods of constitutional interpretation, this Comment will contend that judicial discretion is inevitable and need not lead to unbridled license.

Part II of this Comment provides a general overview of EC law and the ECJ. Part III discusses the ECJ's development of rights through an examination of its case law. Part IV examines the historical similarities between the early U.S. Supreme Court and the ECJ. Part V summarizes and criticizes Rasmussen's position on ECJ activism, while Part VI similarly discusses Bork's view of the U.S. Supreme Court's jurisprudence. Finally, Part VII argues for a purposive theory of constitutional interpretation.

II. THE EUROPEAN COMMUNITY: BACKGROUND

A. The Creation and Structure of EC Law

In the aftermath of World War II, six European nations sought to prevent future war by fostering interdependence. They first chose coal and steel, the essential materials for war, and formed the European Coal and Steel Community (ECSC), in 1952. Next, trade and atomic energy was addressed by the creation of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) in 1958. Proponents of EEC union envisioned a United States of Europe based on the concept "unify their pocketbooks and their hearts and minds will follow."⁶ Now, despite nationalist qualms, the twelve Mem-

4. HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING (1986). Rasmussen never explicitly claims the Danish courts as his ideal, but he nevertheless seems to revere the Danish model of judicial restraint.

5. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

6. Bernard Rudden, Lecture at Oxford University (Apr. 1990). Cf. WYATT &

ber States find themselves drawn together as the 1992 deadline for a common market approaches.

To foster a common market, the Treaties formed a new legal order. While Member States retain autonomy in most internal matters and the more fundamental external matters, the system is both proto-federal and supranational, not purely international. The EC decides many issues by majority vote instead of the unanimity required in classical international law.⁷

The Treaties resemble a constitution: many clauses are vague and broad, others detailed.⁸ The 1967 Merger Treaty fused the organs of the three Communities (EEC, ECSC, and Euratom) into the EC, but each Community still relies on a separate, though similarly worded, treaty.⁹

DASHWOOD, *supra* note 3, at 3-12. After an attempt to create the European Defense Community and the European Political Community failed, the drafters saw the EC as a more gradual way to foster harmony.

7. HARTLEY, *supra* note 3, at 11-12. The acceptance of majority rule after the end of the transitional period is crucial: it signals a willingness to be governed by others and cede unprecedented sovereignty in order to reap the fruits of interdependence.

8. This Comment does not consider why a Bill of Rights was omitted from the Treaties. The Treaties' preparatory documents (*travaux préparatoires*) are kept secret, so that one cannot substantiate any such speculation. Rasmussen rightly dismisses the hypotheses that the drafters thought the issue irrelevant or failed to consider it. Instead, he suggests that they intentionally left the protection of rights to "the individual Member State's Bill of Rights." RASMUSSEN, *supra* note 4, at 390.

Though he bases his reasoning solely on considerations of political expediency, his argument is plausible. However, he downplays the possibility that the drafters simply considered rights infringements unlikely due to the EC's economic nature. See also Pierre Pescatore, *The Protection of Human Rights in the European Communities*, 9 COMMON MKT. L. REV. 73 (1972).

The impossibility of agreeing upon a Bill may have contributed to the omission. See Manfred A. Dauses, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR. L. REV. 398, 399 (1985) (noting that the failure to ratify the European Defense Community and the European Political Community may have encouraged the High Contracting Parties to shy away from potentially contentious issues). Further, the fear that enumerating rights would have allowed the EC to extend its powers up to the limits of those rights may have also contributed to the omission. Weiler, *supra* note 3, at 1112 (citing the American parallel). Finally, diplomats may have thought the European Convention for the Protection of Human Rights (Eur. Conv. on H.R.) and U.N. Universal Declaration of Human Rights would suffice. Note that the European Political Community Treaty incorporated Section I and the First Protocol of the Eur. Conv. on H.R. and was never ratified. WYATT & DASHWOOD, *supra* note 3, at 7.

9. In most cases, the relevant provisions are identical, since the EEC and Euratom were modelled upon the ECSC. Thus the observations in this Comment will, unless noted otherwise, apply to all three Communities. Note that, despite these similarities there are some important differences in wording, based in part on the lessons learned in the first years of the ECSC. For some such differences, see, e.g., TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 215(2); TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY] art. 188 (noncontractual liability); and TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY]

The opening sections of the Treaties outline the aims of the Communities. In the name of "civilisation" and "peaceful relations," the High Contracting Parties "resolved to substitute for age-old rivalries the merging of their essential interests" and to "give direction to a destiny henceforward shared."¹⁰ They further "resolved to ensure the economic and social progress of their countries by common action" towards "the essential objective" of "the constant improvement of the living and working conditions of their peoples" and sought "to preserve and strengthen peace and liberty."¹¹ Pursuant to the Preambles, the opening articles set out such aims as harmonious policies and a common market;¹² the four freedoms of movement of goods, labor, services, and capital;¹³ and the rule barring "any discrimination on grounds of nationality."¹⁴

The Treaties afford isolated protections for individual rights, but contain no Bill of Rights.¹⁵ However, three vague Treaty articles suggest the adoption of unwritten legal principles by analogy to other legal systems.¹⁶ Article 164 of the EEC Treaty (paralleled in ECSC Treaty article 31 and Euratom Treaty article 136) outlines the Court's power: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."¹⁷ Articles 173 of the EEC Treaty, 33 of the ECSC Treaty, and 146 of the Euratom Treaty allow annulment of measures for "infringement of an essential procedural requirement, [or] infringement of this Treaty or of any rule of law relating to its application."¹⁸ Finally, article 215(2) of the EEC Treaty and article 188 of the

art. 40(1) (*faute de service*). Since the EEC and Euratom Treaties were drawn up and ratified at the same time, they are very much similar in the areas under discussion, though not, of course, in subject matter. The Treaties use the terms 'High Contracting Parties,' EEC TREATY art. 1, and 'Member States,' EEC TREATY art. 2, to refer to the twelve nations which belong to the EC: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom. HARTLEY, *supra* note 3, at 3-5.

10. ECSC TREATY preamble.

11. EEC TREATY preamble.

12. EEC TREATY arts. 2, 8; ECSC TREATY arts. 2-3.

13. EEC TREATY art. 3.

14. EEC TREATY art. 7.

15. See generally R. Bernhardt, *The Problems of Drawing Up a Catalogue of Fundamental Rights for the European Community*, BULL. EUR. COMMUNITIES, No. 5 (Supp. 1976) at 23. Such rights include the rights to move freely to other Member States to work, EEC TREATY arts. 48-51, and to equal pay for equal work, *id.* art. 119.

16. This development will be discussed *infra*, at notes 26-87 and accompanying text.

17. EEC TREATY art. 164. ECSC Treaty article 31 has an additional clause after "this Treaty," which is "and of the rules laid down for the implementation thereof. . . ." The phrase "the law is observed" is a translation of the original French phrase "respect du droit." As Derrick Wyatt has pointed out, the word "droit" implicitly suggests the inclusion of unwritten law. Derrick Wyatt, Comments on Manuscript 5 (Oct. 1990) (on file with the author).

18. EEC TREATY art. 173; ECSC TREATY art. 33; EURATOM TREATY art. 146.

Euratom Treaty base noncontractual liability on "the general principles common to the laws of the Member States."¹⁹

B. The Functions of the European Court of Justice

The Treaties assign several roles to the ECJ. It hears cases brought directly by the Commission or other States concerning a State's failure to fulfill Treaty obligations.²⁰ The Court also judicially reviews Community acts.²¹ More commonly, under article 177 of the EEC Treaty it issues what amount to preliminary advisory opinions to national courts on the interpretation of the Treaties and secondary EC acts and the validity of secondary EC acts.²²

In each case, the Court employs an Advocate General, an impartial jurist who summarizes the issues and precedents and offers the Court a preliminary opinion.²³ The Advocate General's opinion in no way binds the ECJ.

Two concepts, both developed in the mid-1960s, have been crucial in the development of the Community legal order: direct effect and supremacy. The doctrine of direct effect, first announced in *Van Gend en Loos*, holds that rules of EC law which are sufficiently clear and unconditional and which require no further implementing measures are self-executing and enforceable in national courts.²⁴ The doctrine of supremacy, first developed in *Costa v. ENEL*, declares that EC law is to be supreme in those areas covered by the EC treaties.²⁵

III. The Case Law of the ECJ

The ECJ's development of general principles of law presaged the recognition of human rights guarantees. A brief examination of the Court's adoption of these general principles will illuminate the subse-

19. EEC TREATY art. 215(2); EURATOM TREATY art. 188.

20. EEC TREATY arts. 169-170.

21. EEC TREATY arts. 173, 175.

22. EEC TREATY art. 177. This route has permitted the human rights issues to emerge because it circumvents the standing requirement which individuals otherwise face. In other actions, individuals must establish that the measure was addressed directly to them or was of direct and individual concern to them, a standard difficult to satisfy.

23. Although the Court does not have a formal doctrine of *stare decisis*, courts, and especially Advocates General, pay attention to what they have written previously. See HARTLEY, *supra* note 3, at 75-76. Thus, although this Comment will use such terms as "overrule" for convenience, technically, such concepts do not apply to the E.C.J.

24. See Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1, at 13, 2 C.M.L.R. 105 (1963). See generally HARTLEY, *supra* note 3, at 185-223.

25. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 3 C.M.L.R. 425 (1964).

quent adoption of human rights assurances. The Court's development of fundamental human rights will then be chronicled and analyzed.

A. General Principles of Law

As noted, article 173 of the EEC Treaty mentions "essential procedural requirement[s]" and other "rule[s] of law" but does not define them. A commentator notes that "there are many customary rules, considered to be so self-evident, though of insufficient importance for codification . . . that they are applied by the Court more or less as a matter of course."²⁶ These rules flow from the Member States' "common legal heritage."²⁷

The earliest case to recognize such rules was *Fédération Charbonniere*.²⁸ In that case, the plaintiff (applicant) invoked the principle of proportionality, which requires that means be proportional to ends, to challenge an ECSC decision fixing coal prices. Proportionality, though not found in the Treaties, exists in the German Constitution. Advocate General Lagrange and the Court agreed that it is "a generally accepted rule of law" that a reaction "must be in proportion to" the problem at hand.²⁹ The ECJ justified the use of this principle: "the rules laid down by an international treaty or law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."³⁰ Similarly, the Court held that an act ought to cause no more harm than strictly necessary to achieve its goals.³¹

In a subsequent line of cases, the Advocate General and ECJ recognized the existence of three inter-related principles—the protection of

26. HENRY G. SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 35 (3d ed. 1979).

27. *Id.*

28. Case 8/55, *Federation Charbonniere v. High Authority of the European Coal and Steel Community*, 1956 E.C.R. 245.

29. *Id.* at 299.

30. *Id.* The Court held proportionality to be such a rule. On the facts, however, it found no violation. The Court explained that such a method is "without . . . recourse to a wide interpretation" and is "a rule of interpretation generally accepted in both international and national law." *Id.* It implied that the principle was to be found in all of the Member States but did not conduct a detailed comparative evaluation.

31. Case 15/57, *Compagnie des Hauts Fourneaux de Chasse v. High Authority of the European Coal and Steel Community*, 1958 E.C.R. 211, 228 (company refused to join an ECSC ferrous scrap fund and pay dues, pleading that more harm than necessary was being inflicted. E.C.J. rejected the latter contention on the facts). See also Case 114/76, *Bela-Mühlé Josef Bergman v. Grows-Farm*, 1977 E.C.R. 1211, 25 C.M.L.R. 83 (1979) (the "Skimmed Milk Powder Case"), in which the offending requirement that animal feed incorporate expensive milk powder to relieve the milk glut was struck down as needlessly harmful as well as discriminatory.

legal rights, the protection of legitimate expectations, and the rule against retroactivity—but held them to be subject to limitations.³² In *CNTA*, the applicant challenged the Community's sudden abolition of a monetary compensation system (designed to cushion businesses against currency fluctuations) for having broken these three rules. Advocate General Trabucchi wrote that the violation was not sufficiently severe, but the Court held that “in the absence of an overriding matter of public interest, the Commission has violated a superior rule of law.”³³

One year after Britain's accession to the EC, the Court drew upon English principles for the first time in proclaiming the procedural requirement of the right to be heard in the *Transocean* case.³⁴ Although the applicant, in challenging an EEC regulation, had not specifically pleaded this ground, Advocate General Warner invoked the English concept of natural justice, which is similar to the American concept of procedural due process. He found parallels in the laws of other Member States (except for Italy and the Netherlands) and suggested that the regulation violated the right to a hearing.³⁵ The Court adopted his reasoning.³⁶ Apart from the oddity of basing a ruling upon a ground not

32. Case 1/73, *Westzucker GmbH v. Einfuhr-und Vorratsstelle für Zucker*, 1973 E.C.R. 723 (certificate promising expert refund adjustment may have vested a right to an increased refund); Case 62/70, *Firma Werner A. Bock v. Commission of the European Communities*, 1971 E.C.R. 897, 11 C.M.L.R. 160 (1972) (the “Chinese Mushroom Case”) (in retroactively blocking import of Chinese mushrooms, the goal was of negligible importance, and did not justify retroactivity) (see especially Advocate General Dutheillet de Lamotte's submissions); Case 81/72, *European Community Commission v. European Community Council*, 1973 E.C.R. 575, 584, 12 C.M.L.R. 639, 657 (1973) (the “staff salaries” case) (despite Advocate General Warner's protests about a legislature's inability to bind its future will, the E.C.J. held that the Council's planning a pay raise scheme created expectations and hence “assumed obligations”); Case 2/75, *Einfuhr-und Vorratsstelle für Getreide v. Mackprang*, 1975 E.C.R. 607, 623, 19 C.M.L.R. 198 (1977) (Advocate General Warner) (legitimate expectations do not protect profiteering from loopholes in EC grain intervention scheme); Case 74/74, *Comptoir National Technique Agricole (CNTA) S.A. v. Commission*, 1975 E.C.R. 533. On retroactivity, see Case 63/83, *Regina v. Kent Kirk*, 1984 E.C.R. 2689, 2719, 41 C.M.L.R. 522 (1984) (EC could not retroactively authorize UK's imposition of national penal sanctions in fishing, which falls within EC sphere); François Lamoureux, *The Retroactivity of Community Acts in the Case Law of the Court of Justice*, 20 COMMON MKT. L. REV. 269 (1983). Note that all three principles are different facets of the concept of legal certainty.

33. Case 74/74, *CNTA*, 1975 E.C.R. at 550.

34. Case 17/74, *Sadolin and Holmblad Transocean Marine Paint Assn. v. European Community Commission*, 1974 E.C.R. 1063, 14 C.M.L.R. 459 (1974) (EEC regulation struck down for imposing a hidden condition upon the extension of an exemption from antitrust rules under EEC Treaty article 85(3). This concealment violated the right to be heard; applicant only contended that the Commission acted *ultra vires* and in infringement of an essential procedural requirement.) 1974 E.C.R. at 1087-88, 14 C.M.L.R. at 468-69.

35. 1974 E.C.R. at 1088-89, 14 C.M.L.R. at 469-71 (Advocate General Warner).

36. 1974 E.C.R. at 1079-80, 14 C.M.L.R. at 477.

pleaded by the parties, *Transocean* is notable for adopting a legal rule nonexistent in two Member States. *Transocean* is also noteworthy because the English concept of natural justice is not rooted in any statute or code. Thus, the Court's willingness to recognize this common-law principle demonstrates its ability to look beyond written constitutions.³⁷

Other principles adopted by the Court in similar comparative law fashion include double jeopardy, good faith, *force majeure*, and unjust enrichment.³⁸

In applying the above general principles, the Court balances individual rights against the general welfare. In the cases, the terms "justification" and "necessity" recur frequently. Although the Court tries to interpret measures so as to respect these rules, "it has allowed real exceptions" to these general principles of law "where the general interest made it imperative."³⁹

B. Fundamental Rights

The ECJ has never explicitly articulated a test for determining what constitutes a right or which rights are fundamental. The Court's reliance on the constitutional traditions of all twelve Member States has led to a fairly broad, inclusive tradition. Since most constitutions incorporate guarantees of life, liberty, and property, the ECJ has treated all such rights as fundamental.

1. The Emergence of Fundamental Rights

Although the ECJ readily incorporated natural justice into Community law, it initially rejected national guarantees of rights as grounds for annulling Community enactments. In the late 1950s and early 1960s, the power of the EC was shaky, and the Court struggled to assert its supremacy. In one case it dismissed an appeal to German constitutional

37. On English common-law freedoms specifically, see SIR ALFRED DENNING, *FREEDOM UNDER THE LAW* (5th ed. 1952).

38. See, e.g., SCHERMERS, *supra* note 26, at 32, 50-51, and John A. Usher, *The Influence of National Concepts on Decisions of the European Court*, 1 EUR. L. REV. 359, 367-68 (1976) (also suggesting estoppel). On double jeopardy, see Case 7/72, *Boehringer Mannheim GmbH v. Commission of European Communities*, 1972 E.C.R. 1281, 14 C.M.L.R. 864 (1973) (especially the submissions of Advocate General Mayras) and Case 14/68 *Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 15, 8 C.M.L.R. 100 (1969). On *force majeure* specifically, see Michael Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, 52 BRIT. Y.B. INT'L L. 29, 47 (1981).

39. Lamoureux, *supra* note 32, at 296. The position on retroactivity is not crystal clear except regarding penal sanctions. See the further discussion of balancing *infra* notes 135-145 and accompanying text. All the cases referred to in note 32 mention balancing.

guarantees as irrelevant to autonomous Community law;⁴⁰ in another case it ignored an applicant's appeal to "basic principles governing all member countries."⁴¹

Despite the ECJ's rejection of such arguments, on two occasions the Advocates General hinted that national rights could have an indirect influence on EC law. In the first *Nold* case,⁴² Advocate General Roemer dismissed the appeal to German constitutional rights but did not exclude "having regard to fundamental legal principles which are also to be found in the provisions of national constitutions."⁴³ The next year, in the *Ruhrkohlen* cases,⁴⁴ the applicant claimed that the EC's dismantling of coal cartels violated vested German rights. The Court strenuously opposed such use of national rights, but Advocate General Lagrange was less categorical: "It is not for the Court . . . to apply, or at least to do so directly, rules of national law, even constitutional rules[.]" but such rules may express "a general principle of law which may be taken into consideration in applying the Treaty."⁴⁵

Political realities necessitated the Court's hard line, because at this early stage in the Community's development, the Court had to claim jurisdiction, promote unity, and seek uniformity. Varying standards of national protection would have blocked European union. Yet even then, Lagrange hinted that EC law could accommodate national rights guarantees if courts administered such protection as part of uniform and sovereign EC law.

By the end of the 1960s, the ECJ had asserted successfully the supremacy and direct effect of Community law, thus solidifying its power. Hence, the Court was prepared to build upon Lagrange's

40. Case 1/58, *Stork v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 17 (applicant's challenge to decision protecting cartels on grounds of fundamental rights of free trade in member states dismissed).

41. Case 40/64, *Sgarlata v. Commission of the E.E.C.*, 1965 E.C.R. 215, 227, 5 C.M.L.R. 314, 324 (1966) (applicant sought annulment of price-fixing of citrus on grounds of "basic principles" of Member States; this claim was ignored). *Stork* and *Sgarlata* phrased claims as national rights; ten years later, similar claims were allowed when treated as EC rights inspired by analogy. See, e.g., Case 29/69, *Stauder v. City of Ulm, Sozialamt*, 1969 E.C.R. 419, 19 C.M.L.R. 112 (1970).

42. Case 18/57, *Nold KG v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 41 (rules change prevented firm from achieving coal wholesaler status; it alleged constitutional violation, but Advocate General said scope of E.C.J. limited to EC law).

43. *Id.* at 73-74.

44. Joined Cases 36, 37, 38, and 40/59 *Ruhrkohlen v. High Authority of the European Coal and Steel Community*, 1960 E.C.R. 423.

45. *Id.* at 450 (Advocate General Lagrange) (emphasis in original, suggesting that Lagrange contemplated and supported the inspiration of EC law by Member States rights).

Ruhrkohlen dictum.⁴⁶ In the *Stauder* case, the plaintiff challenged the German translation of an EEC decision⁴⁷ requiring that he give his name in order to receive surplus butter. He claimed the requirement was contrary to the right of human dignity enshrined in the German Constitution. Although the Court decided the case by remedying a mistaken translation, Advocate General Roemer remarked that certain unwritten rules of law could be used if founded on comparative evaluation of the laws of the Member States.⁴⁸ The Court recognized such unwritten rights in one sentence: "Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."⁴⁹

The Court fleshed out this doctrine in the *Internationale Handelsgesellschaft* case,⁵⁰ in which the applicants challenged an EEC regulation requiring forfeiture of an export-license deposit upon failure to export on grounds of proportionality. Before referring the question to the ECJ, the Administrative Court Chamber of Frankfurt examined the validity of the measure and held that it violated German constitutional rights of business and property.⁵¹ Advocate General Dutheillet de Lamothe "rejected categorically" the suggestion that an EC right could be based directly upon national law. Nonetheless, he then stated:

Does that mean that the fundamental principles of national legal systems have no function in Community law? No. They contribute to forming that *philosophical, political and legal substratum* common to

46. *Stauder v. City of Ulm*, Sozialamt, 1969 E.C.R. 419, 9 C.M.L.R. 112 (1970).

47. A "decision" is an EC legislative measure binding only on the person to whom it is addressed, as opposed to a "regulation", which binds all persons and Member States. EEC TREATY art. 189.

48. See W.R. Edeson & F. Wooldridge, *European Community Law and Fundamental Human Rights: Some Recent Decisions of the European Court and National Courts*, 1976/1 LEGAL ISSUES EUR. INTEGRATION 1, 7-8. Advocate General Roemer did not elaborate upon the comparative legal method because the instant case did not require its application.

49. *Strauder*, 1969 E.C.R. at 42, 9 C.M.L.R. at 119. This was the first recognition of such rights by the E.C.J. and left room for subsequent development. At the time, "general principles of law" had no clear-cut meaning in this context; the term appears in EEC Treaty article 215(2) without definition, and its eventual definition can only be gleaned from subsequent cases. Surprisingly, the definition, as opposed to the scope, of this term has attracted little attention; people seem to have understood it generally as procedural rules and human rights. Furthermore, this sentence in the original French version of the judgment uses exactly the language of EEC Treaty article 164, though the Court does not openly cite the Treaty. M.H. Mendelson, *The European Court of Justice and Human Rights*, 1 Y.B. EUR. L. 125, 131 (1981).

50. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 11 C.M.L.R. 255 (1972).

51. Edeson & Wooldridge, *supra* note 48, at 9,16.

the Member-States from which emerges through the case law an unwritten Community law, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.⁵²

Drawing upon *Fédération Charbonniere* and *Chasse* and interpreting them as cases guaranteeing rights, Dutheil de Lamothe posited that both general principles and articles 39 and 40 of the EEC Treaty guarantee proportionality. The ECJ agreed that national courts could not review the validity of Community measures against any national law because of the EC's autonomy and the need for uniform enforcement. It then sought to mollify the German courts by finding a rule of proportionality: "The protection of [fundamental] rights, whilst inspired by the constitutional traditions common to the Member-States must be ensured within the framework of the structure and objectives of the Community."⁵³ On the facts, however, the Court found no violation of the proportionality principle.

The Court's ruling did not end the matter, because the Administrative Court stated that it was not bound by this preliminary ruling, insisted that it could test Community laws against the German Constitution, and referred the matter to the German Federal Constitutional Court.⁵⁴ In a four to three decision, the Federal Constitutional Court held that directly applicable secondary EC law could not prevail over rights in the German Constitution (*Grundgesetz*). It also stated that Germany could not transfer responsibility for protecting such rights as long as the EC lacked a codified Bill of Rights and a democratically elected Parliament capable of legislating.⁵⁵

In a similar case challenging an EC levy, the Italian Constitutional Court deferred to the ECJ but implicitly reserved the right to strike down the Treaties themselves should the Community violate human

52. *Handelsgesellschaft*, 1970 E.C.R. at 1146, 11 C.M.L.R. at 270, 271 (1972) (emphasis added). One can resolve the apparent paradox when one remembers that the E.C.J. is asserting authority. Thus, the Court accepts such rights insofar as it recognizes them *within EC law* (hence making itself supreme arbiter of EC rights), and does not accept national rights *per se* but instead sees in them elements of the foundation of law.

53. 1970 E.C.R. at 1134, 11 C.M.L.R. at 283. Note that "principles" and "traditions" are both acceptable interpretations of the French word *patrimoine* found in the decision.

54. In such situations, the national court is supposed to act upon and apply without question the answer given by the E.C.J. to the preliminary reference. Hence, the voicing of disagreement and further referral constituted wholesale defiance of the Community legal order and threatened to disrupt the relationship between the court systems.

55. Edson & Wooldridge, *supra* note 48 at 34, 38, 41. Since the European Parliament lacks power, there is little democratic input; but why should a majoritarian institution afford any greater protection to minority rights? Furthermore, since the German courts are themselves zealous in protecting rights, this cannot be an objection to rights activism *per se* but

rights.⁵⁶

Such insistence upon national protection and review threatened to destroy the legal integration essential for economic and political union. Fearing a rebellion of the national courts, the ECJ sought to present itself as guardian of an uncoded, but nonetheless secure, catalog of rights and freedoms.⁵⁷

Soon thereafter, the second *Nold* case, also from Germany, challenged a regulation as violating fundamental rights. In that case, Advocate General Trabucchi reaffirmed the importance of "inspiration from the common traditions" of the States in guaranteeing rights such as property, equality, and proportionality "not expressly laid down" which nevertheless are:

those principles [for the sake of which all law has been established]: we find them in the ancient laws, as the written basis of society, we find them in the codes of the nineteenth century . . . we now find them more formally proclaimed in modern constitutions. . . . [They are] an indisputable characteristic of human personality.⁵⁸

Though these rights are fundamental and inalienable, one must distin-

must be construed as a plea for a bill of rights and a democratic body in addition to judicial protection.

The Commission reprimanded Germany for its threatened disobedience but took no further steps.

In 1986, the German Constitutional Court, after satisfying itself that the EC was adequately protecting rights, overruled its *Internationale Handelsgesellschaft* holding in *Re: The Application of Wünsche Handelsgesellschaft*, 50 C.M.L.R. 225, 265 (BGH 1987) (Germany).

56. *Frontini v. Ministero delle Finanze*, 14 C.M.L.R. 372 (Corte Cost. 1974) (Italy), cited in HARTLEY, *supra* note 3, at 227-28. Despite these proclamations, neither Constitutional Court ever struck down any EC acts as contrary to the Constitution. But see *SpA Fragd v. Amministrazione delle Finanze*, Decision No. 232 of 21 Apr., 1989, 72 RIVISTA DI DIRITTO INTERNAZIONALE 103 (1989) (hinting that the Italian *Corte Costituzionale* might scrutinize EC law for violations of fundamental rights), noted in 27 COMMON MKT. L. REV. 83 (G. Gaja), 97 (H. G. Schermers). Schermers provides a thoughtful, balanced analysis of the dilemma national courts face in deciding whether to interfere with E.C.J. decisions violating rights. He recommends EC ratification of the European Convention for the Protection of Human Rights as a solution but realizes that this is unlikely to occur.

While the French *Conseil d'Etat* has also been recalcitrant and rebellious, its defiance has not been related to human rights. See HARTLEY, *supra* note 3, at 219-45, and Nicolo, 55 C.M.L.R. 173 (Conseil d'Etat 1990) (Fr.) (especially M. Frydman, who suggested that EC law could never supersede French constitutional rules).

57. Commentators generally accept this view. See Weiler, *supra* note 3, at 1118-19, and Rasmussen, *supra* note 4, at 402.

58. Case 4/73, *Nold v. Commission of the European Communities* 1974 E.C.R. 491, 514, 14 C.M.L.R. 338, 348-49 (1974) (applicant's claim, that a regulation requiring a certain volume of purchases to qualify as coal wholesaler violated property and economic activity rights, was dismissed on merits). Though most, if not all, Member States share this view, this passage considers the rights of humans as humans, i.e. as natural, and not merely civil, rights.

guish inalienable rights from absolute rights.⁵⁹ Limitations may be "justified by the general interest," but the core of the right must remain exempt from interference.⁶⁰ In finding that the regulation in question was sufficiently justified, the ECJ agreed that the Community may impose "certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched."⁶¹ This balancing approach resembles that applied by most constitutional courts.

National law, while influencing Community law, does not mechanically determine it. Nevertheless, Advocate General Trabucchi's detailed examination of German law in the *Nold* case demonstrates not only the importance of textual sources for principles but also the politics of satisfying national courts.⁶²

Rasmussen and other commentators have detected a shift from the *Internationale Handelsgesellschaft* approach securing those rights "common to the member-States,"⁶³ which they view as a lowest common denominator approach.⁶⁴ They identify the second *Nold* case as securing the greatest degree of individual rights protection to be found in any of the Member States and suggest that *Nold* No. 2 actually overrules *Internationale*.⁶⁵ The dictum about principles "common to the member-States" is unclear. Rasmussen most likely reads far too much into this lone phrase as requiring unanimity.⁶⁶ If a shift did occur, however, it

59. 1974 E.C.R. at 514, 14 C.M.L.R. at 349.

60. *Id.* Cf. Edeson & Wooldridge, *supra* note 48, at 28-29, 27 n.109. Note that Trabucchi cites four German cases to defend the idea of the "core" of a right.

61. *Nold*, 1974 E.C.R. at 508, 14 C.M.L.R. at 354-55.

62. Edeson & Wooldridge, *supra* note 48, at 32-33. As mentioned in Case 17/74, *Transocean Marine Paint Assoc. v. Commission of European Communities*, 1974 E.C.R. 1063, the Court considers case law and uncoded conventions as well as written constitutions. France and Britain both lack written, binding Bills of Rights yet both figure prominently in the E.C.J.'s comparative legal surveys. Cf. Bernhardt, *supra* note 15.

63. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 11 C.M.L.R. 255 (1972).

64. Edeson & Wooldridge, *supra* note 48, at 29 n.119. Rasmussen also claims that the Court should have developed rights earlier to pave the way for the Court's later activism. Rasmussen, *supra* note 4, at 399. In fact, it worked the other way around: first the E.C.J. had to assert supremacy and direct effect, and only then could it protect rights, secure in applying them as EC and not as national law.

65. Edeson & Wooldridge, *supra* note 48, at 29 n. 119.

66. The Court does not and cannot apply a maximalist position. Weiler makes the case very forcefully and convincingly. Weiler, *supra* note 3, at 1127-28. See Pescatore, *supra* note 8, at 79, SCHERMERS, *supra* note 26, at 29; Case 7/76, *Industria Romana Carni e Affini SpA v. Amministrazione delle Finanze dello Stato*, 1976 E.C.R. 1213, 1217 (Advocate General Warner) which all uphold maximalist protection, but see Case 5/73, *Balkan-Import Export GmbH v. Hauptzollamt Berlin-Packhof*, 1973 E.C.R. 1091, 1130 and Bernhardt, *supra* note

was probably an attempt to appease maverick national courts.

In the final landmark case, *Hauer*,⁶⁷ the applicant, barred from planting vines by an EEC regulation, challenged the regulation in terms of German property and trade rights. The ECJ reinterpreted the question as one of EC principles. It conducted a detailed comparative examination of the German, Italian, and Irish Constitutions and the European Convention on Human Rights. Based upon the property regulations permitted by all four documents, the Court concluded, that infringement of property rights could be justified by the need to protect the general interest.⁶⁸

The ECJ's method of reasoning in *Hauer* is noteworthy. First, the Court, looking at a range of sources such as EC Treaty provisions, national laws, and treaties, distills a general principle inductively, and then deductively applies the principle to the case at hand.⁶⁹ The Advocate General's reference to the European Convention on Human Rights is also notable because the Communities are not signatories to the Convention, although the Member States are all parties to it. Although one commentator suggests that the Community may be bound by the European Convention on Human Rights because its members are, others oppose this view as based on an incorrect understanding of international

15, at 50, 68-9, who points out that a maximalist cumulative position would paralyze the EC. Akehurst notes that Warner's argument rests upon fallaciously applying international law and would be unworkable if two rights clashed. Akehurst, *supra* note 38, at 44. Note two important considerations: 1) since these cases usually involve an individual or corporation against the EC or a Member State, clashes of individual rights have not emerged except insofar as "general good" subsumes individual rights of citizens, and 2) these principles are still limited to the EC sphere; the E.C.J. is not inserting them into Member State law.

67. Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 29 C.M.L.R. 42 (1980).

68. Such reinterpretation of claims of national rights as those of EC rights was not even considered in Case 1/58, *Stork v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 17; Cases 36, 37, 38 & 40/59, *Ruhrkohlen, Verkaufsgesellschaft mbH v. High Authority of the European Coal and Steel Community*, 1969 E.C.R. 419; and Case 18/57, *Nold KG v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 41. *Hauer* was the first to cite explicitly a particular provision of the European Convention on Human Rights. This development is notable because the Convention is an international treaty signed by the Member States but unrelated to the EC *per se*.

69. See Case 118/75, *The State v. Watson & Belman*, 1976 E.C.R. 1185, 1198, 18 C.M.L.R. 552 (1976) (E.C.J. used specific Treaty provisions and secondary EC law to reinforce freedom of movement). The induction proceeds on the basis of provisions found in some of the States, though not always all; hence the need for creativity. Because the States all share a Western heritage, they are not radically at odds on basic rights as, for instance, a country guaranteeing property would be with a Communist country forbidding private property. See SCHERMERS, *supra* note 26, at 28-29 (a principle constitutionally guaranteed in one Member State will, in practice, never be rejected or forbidden in another). However, to reconcile necessarily involves the modification of absolute principles and conflicting practices.

law.⁷⁰ The better view is that since the EC is autonomous, the Convention should be utilized only by analogy and that use of the Convention is "merely a reference to the general principles of which . . . they are a specific expression."⁷¹

2. Those Rights Considered Fundamental

While *Hauer* involved classical negative rights to property and trade, the ECJ has not ruled out the existence of positive rights (e.g., rights to welfare). In *Testa, Maggio, and Vitale*,⁷² three Italian workers who had been collecting unemployment benefits in Germany lost them upon returning to Italy and staying for more than three months. The ECJ and Advocate General Reischl held the time limits to be reasonable and proportionate, but it left open the possibility that a right to property could protect entitlement to social benefits.⁷³ Reischl's emphasis on the social aspect of economics may mark a shift from a liberal to a social

70. Pescatore, *supra* note 8, at 79; Bernhardt, *supra* note 15, at 51; Weiler, *supra* note 3, at 1134-35.

71. Case 118/75, *Watson & Belmann*, 1976 E.C.R. at 1207, 18 C.M.L.R. at 552 (1976) (Advocate General Trabucchi). See also Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219, 17 C.M.L.R. 140 (1976) (limitations on freedom of movement are "a specific manifestation of a more general principle, enshrined in" the Eur. Conv. on H.R., 1975 E.C.R. at 1232, 17 C.M.L.R. at 155. Some have used the assimilation of GATT in Cases 21-24/72, *International Fruit v. Produktschap*, 1972 E.C.R. 1219, 16 C.M.L.R. 1 (1975), to suggest that the Convention also be applied in the EC, but the situations are not analogous.

The question is probably moot in light of the non-binding EC Joint Declaration of the European Parliament, the Council, and the Commission respecting the European Convention for the Protection of Human Rights. 1977 O.J. (C 103) 1 reprinted in BERNARD RUDDEN & DERRICK WYATT, *BASIC COMMUNITY LAWS* 138 (2d ed. 1986) [hereinafter *Joint Declaration*]. It declares that, in light of the E.C.J.'s recognition of general principles of law (including fundamental rights) drawn especially from the European Convention on Human Rights and Member States' laws, the Community intends to respect these rights. In the early 1980s, the Commission proposed that the EC should itself accede to the Convention. The European Parliament also favored this approach, but the E.C.J. opposed this idea, fearing a court superior to itself. The proposal was never adopted. Though in theory there is the danger that the two supra-national courts may issue conflicting judgments, in practice no such danger looms on the horizon. The quieting down of proposals that the EC sign the Convention or promulgate its own Bill of Rights testifies to the effectiveness of the Court's rights policy as a safeguard and a symbol. Note that the Single European Act of 1986, while not formally adhering to the Convention, proclaims in the third recital to its Preamble that the Member States are "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice." Single European Act of 1986, 1987 O.J. (L 169) 2 [hereinafter *SEA*].

72. Cases 41, 121, and 796/79, *Testa v. Bundesanstalt für Arbeit*, 1980 E.C.R. 1979.

73. *Id.* at 1996-98 (E.C.J.), 2007-12 (Advocate General Reischl).

conception of property;⁷⁴ unfortunately, no later case has clarified the matter.

The EEC Treaty, in articles 48-66, protects the free movement of persons and services and the right of establishment in another Member State. Rather than viewing these sections as merely maximizing economic efficiency, the Court has treated them as expressions of fundamental rights. In *Rutili*,⁷⁵ France tried to limit the freedom of an Italian citizen to reside in certain sections of France. The ECJ held that since the freedom of movement is a fundamental freedom conferred by the EEC Treaty, it would construe narrowly public policy exceptions under article 48(3) of the EEC Treaty and ensure that derogations of this right were proportionate to legitimate state aims.⁷⁶ In the absence of a "genuine and sufficiently serious threat to public policy," the restrictions on *Rutili's* movement were unjustified.⁷⁷ Rather than performing a cost-benefit analysis, the ECJ treated the right as a strong, albeit rebuttable, presumption and invoked the proportionality test, which, as noted earlier, is an essential tool in checking abuses of governmental power.

The ECJ has also recognized freedom of religion as a fundamental principle. In *Prais*,⁷⁸ a Jewish woman complained because a hiring examination had been scheduled for a Jewish festival day. The Court dismissed her claim because she had not given the hiring authority notice before the date had been fixed.⁷⁹ The Court remarked, however, that if such a problem had come to the hiring authority's attention in due time, it would have been obliged to take such difficulties into account.⁸⁰ Of

74. A liberal conception views property as what one already possesses and sees government as necessary to protect that property. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-446 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1689). In contrast, a social conception of property embraces government entitlements and therefore insists on a more active government role. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

75. Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219, 17 C.M.L.R. 140 (1976).

76. 1975 E.C.R. at 1231-32, 17 C.M.L.R. at 154-58.

77. *Id.* See also Case 118/75, *State v. Watson & Belmann*, 1976 E.C.R. 1185, 1198, 18 C.M.L.R. 552 (1976). Note Trabucchi's dictum in *Watson* that the Court may indeed "create a new right" but "it would be a sound rule to avoid the fiction of using the actual wording of the Treaty to justify the extension to all citizens of the Community of a right to freedom of movement . . ." 1976 E.C.R. at 1205, 18 C.M.L.R. at 561 (1976). The Court subsequently rejected this reasoning; see Cases 286/82, 26/83, *Luisi & Carbone v. Ministero del Tesoro*, 1984 E.C.R. 377, 44 C.M.L.R. 57 (1985).

78. Case 130/75, *Prais v. Council of the European Community*, 1976 E.C.R. 1589, 18 C.M.L.R. 708 (1976).

79. 1976 E.C.R. at 1598-99, 18 C.M.L.R. at 723-24 (1976).

80. *Id.*

course, requiring that one take difficulties into account does not bar all differential treatment. Given the cases noted above, one would expect the Court to apply a reasonably stringent proportionality test to such differential treatment.

Additionally, the Court has found gender equality to be a fundamental right. Article 119 of the EEC Treaty guarantees both sexes "equal pay for equal work," and the ECJ has held that gender equality exists as a basic principle. In *Razzouk and Beydoun*,⁸¹ two widowers received less generous pensions than widows in their situations would have received, and the Court held for the widowers on the merits. Although the Treaties do not expressly state such a rule, the Court held that this "fundamental right" flowed from article 119.⁸² The Court's method is similar to that in *Hauer*: first induction establishes a general principle, and then deduction applies it to the instant case. In like manner, the Court has derived "a general principle of non-discrimination" from articles 7, 33(1), 36, 40(3), 44(1), 45, and 119 of the EEC Treaty.⁸³

Note, however, that the Court's rights activism applies only to the Community sphere. In the third *Defrenne* case,⁸⁴ the Court upheld the principle of nondiscrimination but noted that it serves only as "a limitation on all Community acts. . . . [L]egal relationships which are left within the powers of the national legislature must be understood to be subject to" national, not Community, safeguards.⁸⁵ Although a commentator has raised the specter of the direct effect of general principles of law, this is not yet the case.⁸⁶ Nonetheless, general principles of law,

81. Case 75/82, *Razzouk & Beydoun v. Commission of the European Communities*, 1984 E.C.R. 1509.

82. *Id.* at 1530. Note that the application of one of the widowers, Beydoun, was held to be inadmissible due to a procedural bar. *Id.* at 1529. See also Case 149/77, *Defrenne v. Soci  t   Anonyme Belge de Navigation A  rienne*, 1978 E.C.R. 1365, 23 C.M.L.R. 312 (1978), especially at 320-21 (Advocate General Capotorti) and 329 (E.C.J.).

83. HARTLEY, *supra* note 3, at 148.

84. Case 149/77, *Defrenne v. Soci  t   Anonym Belge De Navigation Aerienne*, 1978 E.C.R. 1365, 23 C.M.L.R. 312 (1978).

85. 1978 E.C.R. at 1378 (E.C.J.), 1385 (Advocate General Capotorti), 23 C.M.L.R. at 321 (Advocate General), 329 (E.C.J.) (1978).

86. Weiler, *supra* note 3, at 1139-41. The Court concurred that, except in the area of pay, the Community had not "assumed any responsibility for supervising and guaranteeing the observance of the principle of equality" of the sexes. *Defrenne*, 1978 E.C.R. at 1378, 23 C.M.L.R. at 329 (1978). The situation is analogous to that in the United States prior to the adoption of the Fourteenth Amendment; until that time the Bill of Rights only applied at the federal level. Though the Single European Act will lead to a greater range of Community concerns, the principle of national autonomy within certain spheres has not yet been questioned and would seem to be unalterable without some further treaty or accord. One may wonder whether these principles will seep into national law through case law. Courts most likely will continue to distinguish carefully EC rules (which only apply in specified areas) from

including human rights, bind the Member States when they implement Community obligations.⁸⁷

IV. THE U.S. SUPREME COURT: HISTORICAL SIMILARITIES TO THE ECJ

Clearly the ECJ's protection of human rights necessarily has responded in some degree to the realities of a burgeoning political system. Rasmussen correctly remarks that the EC shares many of "the problems and structure of the early American polity" and notes that "much of the constitutional debate which is presently mounting in the European Community has parallels in US judicial history: federal supremacy, expansion of central powers," and so on.⁸⁸ The original proponents of European union envisioned a United States of Europe and modelled their system accordingly. As in Europe, in the thirteen original colonies "vested rights had grown up" and, because each colony imposed its own tariffs and controls, there was the "Balkanization of trade and commerce."⁸⁹ The U.S. and the EC were both established in response to this economic chaos and the plethora of barriers to interstate trade. The Commerce Clause, like the EEC, promoted a common market.⁹⁰ Both have non-parliamentary, multiple branch governments involving, at least initially, vast state autonomy. In both systems, the smaller states feared domina-

national law. That is not, however, to say that such seepage is at all inconceivable: Lord Scarman expects the Continental European methods eventually to supersede those of the common law. Lord Scarman, *Common Law or Common Market, in ENGLISH LAW: THE NEW DIMENSION* (1974).

87. On the general principles binding Member States when they enact Community obligations, see Case 5/88, *Wachauf v. State Bundesamt für Ernährung und Forstwirtschaft*, 60 C.M.L.R. 328 (1991). In that case, the E.C.J. wrote that, in implementing an EC regulation involving milk quotas, a Member State was bound not to violate human rights (such as depriving one of the fruits of his labors without compensation). See also Cases 201 and 202/85, *Klensch v. Secrétaire d'Etat à l'Agriculture et à la Viticulture*, 1986 E.C.R. 3477 (Article 40(3) covers all related measures that both the EC and the Member States implement). But see Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719, 3745-46 (E.C.J. reaffirmed that Member States are unaffected by the EC doctrine of rights except when implementing EC law).

88. RASMUSSEN, *supra* note 4, at 115. Of course, noteworthy differences exist as well, including judicial nomination procedures and structure of the court system. See, e.g., Alyssa A. Grikscheit, *Harnessing Fundamental Human Rights to Achieve Integration: The Evolution of the European Court of Justice in Light of the U.S. Federal Experience*, 16, 18 (Mar. 1991) (unpublished manuscript on file with author).

89. RASMUSSEN *supra* note 4, at 118.

90. "In the Commerce Clause, [the Framers] provided that the Nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separate economic entities." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (citations omitted).

tion by the larger, so both governments embody a weighted voting compromise to protect them. And while the Treaties are more detailed than the U.S. Constitution,⁹¹ both are vague in sections and leave much room for interpretation.

In both systems, federal judges promoted strong central values. This centralism was bound to conflict with state sovereignty. Like some of today's Europeans, many Americans believed that "the States were sovereign afterwards as well as before; and they alone were sovereign because a partition of sovereignty is impossible."⁹² These states' rights advocates reasoned that since the validity of the U.S. Constitution rested upon the consent of states, the federal system's powers must still be subject to those limitations that bind the states,⁹³ much as the early German plaintiffs kept insisting. Even the more moderate version of interposition (allowing states to decide to what extent federal law would apply) would have been incompatible with any workable national government.⁹⁴ Thus, the early Courts sought to establish their supremacy over all other courts and assert their powers to determine jurisdiction.

Unlike the EC Treaties, the U.S. Constitution does not explicitly authorize judicial review. In *Marbury v. Madison*,⁹⁵ Chief Justice Marshall used the logic of the supremacy of the Constitution to demonstrate the need for judicial review and, therefore, its existence. His backhanded introduction of judicial review, while denying *Marbury* a writ of mandamus, resembles the ECJ's method of recognizing fundamental rights in *Stauder*, *Internationale Handelsgesellschaft*, and *Nold* No. 2 without finding actual violations on the facts: both maneuvers deflected criticism (since the dicta did not affect the results) while at the same time establishing precedent.

Both Justice Marshall and Justice Story supported strong national authority at the expense of state action just as EC action preempted UK law in the *Kent Kirk* case.⁹⁶ In *Martin v. Hunter's Lessee*,⁹⁷ Justice Story

91. For instance, where the U.S. Constitution gives Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes", U.S.CONST. art. I, § 8(3), the EEC Treaty delves into acceptable tariff percentages and classifications, EEC TREATY art. 78(3), and percentages of financial contributions due from each Member State, *id.* art. 200.

92. RASMUSSEN, *supra* note 4, at 122.

93. *Id.* at 122-23.

94. For a discussion of the "truculent" South Carolina doctrine of nullification, which in its most extreme form "forb[ade] any appeals to the Supreme Court," see Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1-34, 161-89, 162, 175 (1913).

95. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

96. Case 63/83, *Regina v. Kent Kirk*, 1984 E.C.R. 2689, 41 C.M.L.R. 522, 538 (1984).

vigorously upheld the appellate jurisdiction of federal courts over state courts.⁹⁸ Perhaps his strongest argument rested upon the need for uniformity and harmony of decisions on all constitutional matters throughout the country. Again, the insistence on harmony recalls the ECJ's use of uniformity as a justification for adjudicating clashes between state and Community measures.

Article 235⁹⁹ of the EEC Treaty, which permits action in areas not otherwise provided for if necessary to achieve the Treaty's ends, is the analog of the Necessary and Proper Clause. The latter formed the basis for Justice Marshall's opinion in *McCulloch v. Maryland*,¹⁰⁰ which upheld the creation of a national bank. Just as the ECJ has given the Communities substantial leeway, Justice Marshall allowed the national government breathing room. He declared, "[l]et the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and the spirit of the Constitution, are constitutional."¹⁰¹ Although Rasmussen assails the Court's lenient attitude towards the use of article 235,¹⁰² he fails to see that both Justice Marshall and the ECJ realized the need for flexibility in achieving federal ends. Timeless documents must be flexible, interpreted according to both spirit and letter. As Marshall cautioned, "[w]e must never forget that it is a *constitution* we are expounding."¹⁰³

Just as Member State courts have protested against the ECJ's federal approach, so American state courts rebelled. In the first few decades of the American republic, state courts repeatedly challenged the Supreme Court's appellate jurisdiction.¹⁰⁴ Moreover, these problems did not van-

97. 14 U.S. (1 Wheat.) 304 (1816).

98. See also *U.S. v. Judge Peters*, 9 U.S. (5 Cranch) 115 (1809) (Chief Justice Marshall affirmed supremacy by arguing for its necessity).

99. Article 235 provides,

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

EEC TREATY art. 235.

100. 17 U.S. (4 Wheat.) 316 (1819). Rasmussen notes that Kutscher, has defended the E.C.J.'s activism in *McCullochesque* language. RASMUSSEN, *supra* note 4, at 182. Note also the resemblance to *Case 6/64, Costa v. ENEL*, 1964 E.C.R. 585, 3 C.M.L.R. 425 (1964).

101. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

102. RASMUSSEN, *supra* note 4, at 409.

103. *McCulloch*, 17 U.S. (4 Wheat.) at 407 (emphasis in the original).

104. See, e.g., *Respublica v. Cobbett*, 3 U.S. (3 Dall.) 467 (1798) (Pennsylvania Supreme Court refused to allow an action to be removed to Federal Circuit Court); *Hunter's Lessee v.*

ish completely with the passage of time. In the most notable recent example, state supreme court judges were so incensed by *Brown v. Board of Education*¹⁰⁵ that they claimed the U.S. Supreme Court had usurped state power and had effectively written their policy preferences into the Constitution.¹⁰⁶ For the most part, however, the state courts have accepted the federal courts, just as the German courts in *Wünsche* have finally abjured nationalist defiance.¹⁰⁷

Additionally, the Warren Court's discovery of a right of privacy in *Griswold*¹⁰⁸—by examining penumbras of the Bill of Rights and inductively distilling principles—resembles the inductive derivations of rights in *Watson and Belmann*¹⁰⁹ and *Defrenne* No. 3.¹¹⁰

A key difference between the two judicial bodies is that while the U.S. Supreme Court applies different tests to liberty and property rights,¹¹¹ the ECJ has only one test. Though *Stauder* involved human dignity, *Internationale Handelsgesellschaft*, *Nold* No. 2, and *Hauer* all recognized the importance of property rights. Throughout all these cases, there is no sign that the Court views restrictions on property as any different from restrictions on liberty.

Rasmussen recognizes that "the [Supreme] Court's authority and legitimacy was never fundamentally weakened or crippled" in political conflicts.¹¹² However, instead of drawing from this the logical conclusion that the ECJ is likely to weather the occasional storm of criticism, he draws the opposite conclusion. He bases this in part on his assertion

Martin, Devisee, 18 Va. (4 Munf.) 1 (1815) (Virginia Supreme Court refused to obey U.S. Supreme Court's overturning of Virginia's decision); *Johnson v. Gordon*, 4 Cal. 368 (1854) (California Supreme Court denied U.S. Supreme Court's supremacy). All of the foregoing cases, along with numerous examples of legislative disobedience and popular unrest, are discussed and cited in Warren, *supra* note 94, at 4-5, 9-11, 176.

105. *Brown v. Board of Education*, 347 U.S. 483 (1954).

106. See Charles Alvin Jones (then Chief Justice of Pennsylvania), speech reported in HARVARD L. RECORD (Oct. 23, 1958), cited and discussed in Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AMER. POLI. SCI. REV. 1017, 1019-20 (1959). See also *Brown v. Board of Education*, 347 U.S. 483 (1954).

107. *In re Application of Wünsche Handelsgesellschaft*, 50 C.M.L.R. 225, 265 (BGH 1987) (F.R.G.).

108. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

109. Case 118/75, *The State v. Watson & Belman*, 1976 E.C.R. 1185, 18 C.M.L.R. 552 (1976).

110. Case 149/77, *Defrenne* No. 3, 1978 E.C.R. 1365, 23 C.M.L.R. 312 (1978).

111. For examples of the multiple levels of scrutiny under the Equal Protection Clause of the Fourteenth Amendment, see *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (*per* Harlan, J. (dissenting)); Paul A. Freund, *The Supreme Court and Fundamental Freedoms*, in JUDICIAL REVIEW AND THE SUPREME COURT 125-28 (Leonard W. Levy ed., 1967).

112. RASMUSSEN, *supra* note 4, at 143.

of the "increasing social indigestibility of pro-central government judicial activism,"¹¹³ when in fact the strongest nationalist holdout, Margaret Thatcher, was forced out of office in part for her anti-Europe stubbornness. As Mendelson notes, "many major constitutional developments rest on once-debated legal foundations—one thinks of *Marbury v. Madison*, for example."¹¹⁴ If Rasmussen's American parallel demonstrates anything, it shows that activism, even when unpopular, can draw a nation together.

V. RASMUSSEN'S VIEWS

Except where noted, most commentators have agreed on the historical description of the case law presented above.¹¹⁵ There has been very little explicit evaluation of the ECJ's role, and what little has occurred is tacitly pro-activism.¹¹⁶ Much of this changed in 1986, when Hjalte Rasmussen stirred up a storm in the scholarly community by openly criticizing the Court's activism in a number of fields, including human rights, as "constitutional rewriting" and judicial legislation.¹¹⁷

A. Rasmussen's Critique

Rasmussen maintains that a normative theory of interpretation of the EC treaties is impossible because of the lack of consensus about union and the inaccessibility of a unified original intent. Thus, his criticisms of the Court rely on sociological attempts to measure intolerance and backlash in the literature and statements of national courts.¹¹⁸ Nevertheless, where he thinks it feasible, he attempts to divine the intent of the Founders and then bases his analysis of what the Court ought to have done upon such intent, presumably because original intention can give a text its proper, objective meaning.¹¹⁹ Rasmussen dislikes excessive judicial discretion and fears that activism is undermining the perception of the Court's neutrality. His central criticism of activism is that it will lead to

113. *Id.* at 142. True, levels of nationalism may still be high, but the tide of pan-Europeanism has been increasing. See also Cappelletti, *supra* note 2.

114. Mendelson, *supra* note 49, at 162.

115. See, e.g., HARTLEY, *supra* note 3, at 129-52; RASMUSSEN, *supra* note 4, at 390-409; and SCHERMERS, *supra* note 26, at 23-64.

116. See, e.g., RASMUSSEN, *supra* note 4, at 154-83, 265 (his literature survey, where the sources of criticism of activism rest mainly in an "oral tradition" and the occasional written remark).

117. *Id.* at 31, 30, 51, 81, 147, 201. He accepts uncontroversial interstitial lawmaking.

118. Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28, 34-35 (1988) [hereinafter *Between Self-Restraint*].

119. See, e.g., RASMUSSEN, *supra* note 4, at 62, 390-93, 403, 500 n.50.

a national backlash and will cost the Court "authority and legitimacy,"¹²⁰ crippling the judicial branch.

While he admits that the Preambles may offer some limited guidance, he assails the ECJ's use of broad phrases as "seek[ing] inspiration in guidelines which are essentially political [in] nature and, hence, not judicially applicable. This is the root of judicial activism which may be an usurpation of power."¹²¹ Viewing majority rule as the norm in all government, he sees only one justification for judicial review: the filling of gaps between democratic will and social reality caused by structural and functional inertia.¹²² Any other review, according to Rasmussen, is antimajoritarian and presumably elitist.

Finally, Rasmussen maintains that in the absence of normative constraints, the Court is essentially and inevitably a political institution. Hence, it ought to be more open about its policy role without using that role to undermine the natural rule of majorities.¹²³ Despite words elsewhere to the contrary, Rasmussen is singularly uncomfortable with judicial discretion; if it is to exist at all, he feels, it must be openly political. Apart from these few suggestions, he offers no theory of how courts should adjudicate.

To summarize, then, Rasmussen attacks the ECJ on four points: the heritage and sources upon which its jurisprudence relies, its interpretive method, the importance of original intent, and the role of policy in its decisions.

B. Analysis

In response to Rasmussen's first criticism, it is true that the Treaties do not mandate a jurisprudence of human rights on their face. Yet such protection of rights complements the text well, given its concern for "essential procedural requirement[s]"¹²⁴ and "rule[s] of law"¹²⁵ and "gen-

120. *Id.* at 10.

121. *Id.* at 62 (emphasis removed).

122. *Id.* at 62-63.

123. *Id.* at 415-18.

124. Rasmussen's silence regarding procedural principles is relevant. We accept procedural principles intuitively as a necessary component of a legal system. The procedural rules versus substantive rights distinction is, at best, vague and, at worst, untenable. "Procedural" rules are chosen because they further a substantive conception of justice. For instance, one may view "procedural" safeguards for criminals as protecting basic human dignity. Similarly, although equality may be a procedural rule, such a supposedly value-free choice rests upon the recognition of individual worth and fairness. If there is no meaningful difference between the two kinds of unwritten law, Rasmussen is inconsistent in tacitly accepting the other general "procedural" principles of law.

125. EEC TREATY art. 173.

eral principles of law common to the laws of the Member States."¹²⁶ Furthermore, the Preambles, as noted, sketch out a blueprint which can guide the Court. Rasmussen dismisses the Preambles and broad opening articles as political rhetoric not fit for general judicial use. Difficulty in interpreting vague terms, however, is no excuse for ignoring them, and the Court's interpretation of such clauses as generally binding "statement[s] of legal norms" makes sense.¹²⁷ The mission of "the Court of Justice [is to] ensure that in the interpretation and application of this Treaty the law is observed."¹²⁸ Since "the law" is to be applied to the Treaty, that text implies that the law transcends the clauses. Proof further lies in article 173(1) of the Treaty, which speaks of violations of "this Treaty *or* of any rule of law relating to its application."¹²⁹ Such rules of law apply to and transcend the Treaties. In light of this broad language, judges ought to apply Community law as a coherent and principled whole.

The Court tries to create a mosaic patterned by the Treaties. The EC, as a proto-federal system, has more in common with ordinary nations than with conventional international organizations and thus can usefully draw upon accumulated national wisdom. For instance, French law has influenced the EC greatly due to France's important role in setting up the Community, and the Treaties draw heavily upon French legal terms such as *faute de service* in article 40(1) of the ECSC Treaty. In responding to German fears, the Court has drawn more heavily upon German principles such as legal certainty and proportionality. And the ECJ's move towards a case-law approach may be explained by the accession of the UK and Ireland, who utilize this approach heavily. The Court does not pay exclusive attention to the legal principles of larger nations; cases from the Netherlands, for instance, have produced some extremely important developments.¹³⁰ Finally, the ECJ may even look

126. EEC TREATY art. 215(2).

127. Cappelletti, *supra* note 2, at 8 (critiquing Rasmussen's skepticism).

128. EEC TREATY art. 164.

129. (Emphasis added); see HARTLEY, *supra* note 3, at 129-31 (emphasis added).

130. English law, while not cited quite so frequently, has been important. However, the Court has rejected the English notion of unlimited Parliamentary sovereignty. Case 81/72, *Re: Civil Service Salaries: EC Commission v. EC Council*, 1973 E.C.R. 575, C.M.L.R. 639 (1973) (over Advocate General Warner's objections). For the importance of Dutch law, see, e.g., Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1, 2 C.M.L.R. 105 (1963) and Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities*, 1971 E.C.R. 975 (Dutch administrative law had a great impact on the Schöppenstedt formula.) It is still too soon to judge the weight of the three countries which joined most recently (Spain, Portugal, and Greece).

to non-member Western countries for guidance.¹³¹

The ECJ, in comparing legal systems for inspiration, faces a host of possible texts and corresponding problems.¹³² For instance, Great Britain has no written constitution; therefore any comparative examinations must delve into such sources as British practices, customary law, *ius cogens*, and international treaties.¹³³ The variety of legal systems (Ro-

131. Geoffrey Marshall, remarking upon a recent book by the President of the German Constitutional Court, notes that the tests of proportionality used by courts in Canada and the United States are remarkably similar to Germany's tests, as are the weighing and balancing of competing rights. Geoffrey Marshall, *For Dignity and Liberty*, THE TIMES LITERARY SUPP., Sept. 21-27, 1990, at 995 (reviewing DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1990)).

132. The resolution of this clash does not fit the conflict of laws paradigm. The Court is creating a new, independent body of law for a new supranational framework and so needs some rule of inspiration distinct from those which merely select one body of law. Imagine that a Dutch individual has a complaint against the Italian government which falls within an EC sphere, such as freedom of movement; in such a case, the rule that both parties should be heard may be applied even though it is found in neither Italian nor Dutch law.

For some insights on the common and dissimilar elements in the various western legal systems, see *id.* at 995.

133. Akehurst, *supra* note 38, at 31, 34-35. On customary law and *ius cogens* see THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); and MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980). For further discussion of the Eur. Conv. on H.R., the European Social Charter, and the International Labour Organisation Convention, see Case 149/77, Defrenne v. Société Anonyme Belge de Navigation Aérienne (SABENA) 1978 E.C.R. 1365, 23 C.M.L.R. 312 (1978); and Bernhardt, *supra* note 15, at 51, 46, where he accepts that international customary law does have an influence but is unclear as to its extent. Cf. the discussion of *Transocean Marine*, *supra* notes 34-36 and accompanying text (English unwritten natural justice applied). Though common law might seem to be more difficult to cite, there is at least one judge from each Member State, and the Advocates General contribute their wisdom, so it would seem that someone (especially the British judge and perhaps the Irish judge) would know enough to ensure that common law is not underrepresented, though that fear is quite understandable. Though chambers consisting of subsets of the full Court hear minor matters, any case raising serious issues of principle or rights will be heard before the full Court.

On the issue of EC law's similarity to other international organizations, the orthodox view is that the EC has created a "new legal order" which is both autonomous and fundamentally different in kind from classical international law. See, e.g., Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 3 C.M.L.R. 425 (1964); HARTLEY, *supra* note 3, at 85-87; and DOMINIK LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 230 (2d ed. 1976). But, for every orthodoxy, there is of course a heresy. See Derrick Wyatt, *New Legal Order, or Old?*, 7 EUR. L. REV. 147, 156-57 (1982), citing PIETER VAN DIJK, JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE 481 (1980). Wyatt's argument is that the conventional view of EC law as a *sui generis* system is incorrect. One reason he advances is that the kind of reasoning from general principles the E.C.J. employs draws upon the same method as found in public international law, such as the "general principles of law recognized by civilised nations" referred to in article 38(1)(c) of the Statute of the International Court of Justice. *Id.* at 147, 157. He also avers that the teleological method is employed in international law. *Id.*

man-based, common law, French Code, etc.) of Member States is bound to cause problems. However, the systems have influenced each other (for example, the importation of French law into England during the Norman Conquest), and there are similarities. Nevertheless, while the common Western heritage of the Member States has led to agreement on many matters of principle, the detailed implementation of these principles has varied.¹³⁴

Rasmussen's second criticism, that the Court's interpretive method is faulty, is similarly shortsighted. As Lord Diplock wrote, "courts by the very nature of their functions are compelled to act as legislators."¹³⁵ Rasmussen criticizes the Court's approach, but the "rule of law, not of men," is an ancient myth. Like scholarship, judging involves sifting and then evaluating from some perspective.¹³⁶ Precedent and codified laws can never answer all legal questions that possibly could arise. Just as English judges effectively "resorted to the myth of the common law," the ECJ answers such questions with general principles of law.¹³⁷ In pursuing guidelines given in the necessarily vague Preambles, the Court must exercise discretion, just as it must in responding to situations not envisaged by the drafters.¹³⁸

The Court is open and consistent about its textually based teleology, and so its method is principled. The original Treaties foresaw "a destiny henceforward shared" and "a broader and deeper community."¹³⁹ The Member States reaffirmed these goals in the Merger Treaty, which "[r]esolved to continue along the road to European unity,"¹⁴⁰ and again in the Single European Act, which sought "to transform relations as a

134. Bernhardt, *supra* note 15, at 58-59, 65-67; Dausies, *supra* note 8, at 407-08 ("liberal democratic principles" and heritage unite, but method and structure diverge).

135. Lord Justice Diplock, *The Courts as Legislators* in *THE LAWYER AND JUSTICE* 263 (Brian W. Harvey ed., 1978). Compare *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219, 17 C.M.L.R. 140 (1976) and *Comptoir National Technique Agricole (CNTA) S.A. v. European Community Commission*, 1975 E.C.R. 533.

136. RASMUSSEN, *supra* note 4, at 31, 62; Cappelletti, *supra* note 2, at 13.

137. HARTLEY, *supra* note 3, at 129. See generally JOHN G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30-70 (1957) (all of English common law, even new powers, ideas and principles, was justified by reference to immemorial custom yet continually refined by judges in a historically evolving way). For an account of common law development, see SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed. 1968).

138. The Preambles outline a vision of a just system. Some, but not all, of the principles needed may be catalogued, but, as new problems arise, we must "[discern] afresh and . . . articulat[e] and [develop] impersonal and durable principles." Henry M. Hart Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 4, 25 (1959).

139. ECSC TREATY preamble.

140. ECC TREATY preamble.

whole among their States into a European Union."¹⁴¹ Hence, the texts embody a commitment to European Union. Since all Member States repeatedly have assented to these documents, the Court should uphold the textually-supported goal of union.¹⁴²

Though it cannot merely aggregate a hodgepodge of national rules, the ECJ is correct in safeguarding rights jealously by applying critical scrutiny to measures violating these rights for some purported general good. Law is not mathematics, and one cannot lay down rigid rules.¹⁴³ Nonetheless, the EC's aims, supra-national situation and vantage; the relative weights of the legal systems and the E.C.H.R.; and a principle's compatibility with the Treaties all figure in the balance.¹⁴⁴ It is therefore absurd to reason via the slippery slope that any exercise of judicial discretion must result in total discretion.¹⁴⁵

At first some jurists thought that unwritten law could fill in only

141. SEA preamble.

142. Of course, the issue of teleology has not been resolved definitively. Nonetheless, many commentators agree with the assertion that "the Community was intended, by at least some of its founders, to be a first step towards a European federation, a United States of Europe." HARTLEY, *supra* note 3, at 6. The texts of the Treaties embody and express this plan. Not only do the Merger Treaty and Single European Act reaffirm the Treaties' commitment to union, but the EC's praise in the form of the Joint Declaration and the Member States' affirmation of the Preamble to the Single European Act demonstrates that the Court has helped to meet that goal by filling a deeply felt gap in the Treaty framework. Moreover, despite genuine nationalist fervor, the public support for union has been growing. See, e.g., Cappelletti, *supra* note 2. Not all share a desire for full union, but most Europeans agree in principle with European union even when they resist its imposition upon themselves.

143. Despite his hostility to the E.C.J.'s activism, Rasmussen recognizes that "mechanical jurisprudence is defunct." *Between Self-Restraint*, *supra* note 118, at 31.

144. Akehurst, *supra* note 38, at 33-34, 37; Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities*, 1971 E.C.R. 975, 989-90. (Advocate General Roemer suggests that the E.C.J. is free to select the most carefully considered principle).

Ulrich Scheuner, in *Fundamental Rights in EC Law and in National Constitutional Law: Recent Decisions in Italy and in the Federal Republic of Germany*, 12 COMMON MKT. L. REV. 171, 185 (1975) put the point thus:

To evolve common principles from the various constitutional systems of the member States a comparative method is needed. What does this mean? It is not possible to transfer definite formulations or details from the one or the other national order . . . The general principles observed in the Community must be uniform, [*sic*] they cannot vary from case to case according to the nationality of the parties concerned. The comparative analysis cannot cling to particular details, but must follow the general trend of the evolution of legal prescriptions; it must lead to a result acceptable in all member States. Its object must be to find the rules best suited to express a common tradition and compatible with the structure of the Community . . . They must be consistent with the basic aims and objectives of the Community. They require, in one word, transplantation and acclimatization to a new environment.

145. This contention is developed *infra* at notes 203-17 and the accompanying text.

"obscurity, insufficiency or gaps in the written law."¹⁴⁶ Now they accept that such rules may override secondary EC laws but not the Treaties themselves.¹⁴⁷ Not all principles are applied contrary to written law (*contra legem*); for instance, the Court only implies *force majeure* exceptions subordinate to written law (*infra legem*), using them as default rules of interpretation.¹⁴⁸ A commentator distinguishes principles *contra legem* from those *infra legem* by finding "an element of justice, fairness or equity" in the former, terming it "a form of natural law," but he admits that this division is at best inexact.¹⁴⁹ Of course, principles do not obviate the need for positive law. For instance, the ECJ refused to create a statute of limitations, ruling that it had to be enacted as legislation.¹⁵⁰

Third, Rasmussen's use of original intent is unpersuasive. He uses speculation about authorial intention as a foundation for attacks upon the Court's deviations from the original intent.¹⁵¹ However, using such an original intention is neither possible, since the *travaux préparatoires* are kept secret, nor desirable. Such speculations as to the contents and thought processes of the authors are too flimsy to permit any authoritative criticism. Often there is no one reason for having enacted or failed to enact a provision; the agreement on a form of words can easily conceal vast differences in substance, and looking at original authorial intent may cause more problems than it solves.

The intentions that should matter are those manifested in the text, for the Member States signed documents, not ethereal lists of intentions. The drafters could not have anticipated all possible situations, but they laid down principled guidelines and left application to the functionaries

146. Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1132, 11 C.M.L.R. 255, 272 (1972) (Advocate General Dutheil de Lamoignon calling this a "good judicial technique").

147. L. NEVILLE BROWN & FRANCIS G. JACOBS, *THE COURT OF JUSTICE OF THE EC* 219 (1977); Akehurst, *supra* note 38, at 29-30. But see Daus, *supra* note 8, at 406-07. Treaty provisions are unlikely to clash inexorably with a fundamental right. Furthermore, by using rights as interpretive aids, one can avert clashes. Since these principles form part of the Treaty context and structure, they do and ought to override subordinate legislation, but only to serve as a rule of construction for the Treaties.

148. Akehurst, *supra* note 38, at 47.

149. SCHERMERS, *supra* note 26, at 26-27.

150. Case 45/69, *Boehringer GmbH v. Commission*, 1970 E.C.R. 769 (Advocate General Gand proposed adoption of such a rule; E.C.J. rejected it, but did not discuss what could and could not be done by the courts. One would hope that they will explicate such guidelines). This decision signals the Court's clear recognition that many problems fall outside of judicial competence.

151. RASMUSSEN, *supra* note 4, at 26, 390. But whose intentions should count? Drafters? Ratifiers? Voters? Contemporary commentators? He bases much reasoning on such ethereal speculation.

of the EC. Although Advocates General sometimes refer to "original intent," the Court derives from the text itself what Ronald Dworkin calls an "institutionalized intention," a hypothetical textual intent rather than an actual historical belief.¹⁵² The ECJ uses the spirit and purpose of the text as a guide:

In the interpretation of the Communities' founding treaties, no principle is more firmly established than that which commands that each Article must be interpreted in such a manner as to secure the objects of the treaty in which it appears . . . it forms the very basis of the Court's method of interpretation.¹⁵³

The Court is constrained by "the spirit, the general scheme and the wording," and "the objective" of the Treaties.¹⁵⁴ The ECJ ought not to contradict the words of the Treaties, but some flexibility is essential to what aspires to be a timeless document.¹⁵⁵ A constitution is not an ordinary contract: it cannot rest upon the specific intentions of the parties at the time but must be flexible and general enough to adapt and improve.¹⁵⁶ By "interpreting, supplementing, and integrating" the various principles and sources of law, the Court may exercise discretion within

152. For an excellent examination of the subject regarding actual and textual intention see Richard Plender, *The Interpretation of Community Acts by Reference to the Intentions of the Authors*, 2 Y.B. EUR. L. 57, 57-58, 62, 63, 66 (citing Advocate General Mayras's rejection of actual intent in the Reyners case).

153. *Id.* at 66.

154. Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1, 12-13, 2 C.M.L.R. 105 (1963). Cf. Plender, *supra* note 152, at 67-78, on international agreements and teleological interpretation.

There is a subtle but powerful point concerning the E.C.J.'s jurisdiction. Since article 164 of the EEC Treaty refers to the interpretation of the Treaty, general principles can thus be used to interpret the E.C.J.'s own jurisdiction. Letter from Bernard Rudden, Prof. of Comparative Law, Oxford University, to Steven A. Bibas (Oct. 15, 1990) (on file with the author). Thus, in Case 294/83, *Partie Ecologiste 'Les Verts' (The Greens) v. European Parliament*, 1986 E.C.R. 1339, 49 C.M.L.R. 343 (1987), the Court, to avoid "a result which is contrary both to the spirit of the Treaty as expressed in article 164 thereof and to its overall structure," interpreted article 173 in such a way as to enlarge its jurisdiction and allow action to be brought against the European Parliament (though it is not explicitly listed as a potential defendant before the E.C.J.).

155. See RASMUSSEN, *supra* note 4, at 25-31. One certainly may question whether the Treaties are analogous to a constitution. To borrow an argument from Ronald Dworkin, however, should the Court make the Treaties the best that they can be (i.e. most efficacious at securing the ends they were designed to achieve). See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

156. See, e.g., *The Legal Tender Cases*, 110 U.S. 421, 439 (1884) ("A constitution, establishing a frame of government, declaring fundamental principles, and creating national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract").

principled textual and contextual constraints.¹⁵⁷

Rasmussen's fourth concern, the Court's supposed tendency to become embroiled in politics and policy, is thus allayed by such constraints. The Court's outlook stems from the Treaties which the Member States ratified; hence, although "the vision of a great court, of course, should itself not be arbitrary, . . . such a vision, far from being arbitrary, is fully legitimate, for it is rooted in the text."¹⁵⁸ Although the Court may involve itself in politics, raising fears of judicial tyranny, the texts both constrain discretion and legitimate principled activism taken in furtherance of the broad aims of the Treaties.

Rasmussen also continually worries about public perceptions of the ECJ's "authority and legitimacy."¹⁵⁹ The carefully timed and staged introduction of general principles beginning in *Stauder*, however, shows care in averting such crises. At the same time, the ECJ has avoided becoming enslaved by public opinion. Curiously, Rasmussen assails this careful progression as "an authority-consuming judicial vacillation."¹⁶⁰ Certainly, a court ought not to usurp power and become unelected tyrants, but any court upholding its mission is bound to draw complaints and, at times, impede the will of the majority. As Cappelletti notes, "[i]t is one of the most important virtues of the judicial function generally, and of judicial review especially, not to be strictly bound to the environment's powers and pressures."¹⁶¹ Otherwise, minority rights would be at risk. Rasmussen, justifying judicial review entirely in terms of the gap between democratic will and reality, falls into the trap of pure majoritarianism. He fails to see that protection of minorities from majority tyranny is a more important justification, especially when that protection is unpopular.

Rasmussen's majoritarian outlook faces three basic problems. The first is that the only democratically chosen body in the EC, the Parliament, is virtually powerless. The Court is, therefore, not being antidemocratic. Second, democratic or republican institutions do not always reflect the beliefs of the people. Minority special interests and factions, insufficient information, infrequent voting, and other barriers

157. Plender, *supra* note 152, at 103.

158. Cappelletti, *supra* note 2, at 8. For support of the public opinion contention, see Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 2 LEGAL ISSUES EUR. INTEGRATION 1 (1979).

159. RASMUSSEN, *supra* note 4, at 10.

160. *Id.* at 390.

161. Cappelletti, *supra* note 2, at 6 (emphasis in the original). He cites John Hart Ely and Alexander Bickel in support of his view that the judiciary must in some ways be a buffer against unbridled majoritarian rule.

make true representation difficult. Third, and most important, there is the Madisonian dilemma: even if all practical problems with democracy could be swept away, courts would be needed to protect minority rights. The ECJ must ensure that the EC bureaucracy respects individual rights. Our society values individuals not merely as voting members of a majority, but as worthwhile humans in their own right with moral autonomy and certain rights.¹⁶² For this protection to remain meaningful, courts must keep pace with the growth and development of the other branches; otherwise, the balance of powers will be thrown askew.

In summary, consistent, purposive activism provides an alternative to deferring to the whim of unelected Eurocrats. It fills bureaucratic and democratic gaps, protects minority rights, and promotes the goals of the Treaties. Rasmussen invokes original intent to criticize such activism, but he can only speculate as to what that original intent might be and then use these guesses to attack the Court's attempts to create a workable Community system.¹⁶³ He complains of perceived problems of legitimacy, yet the only alternative he offers, namely a fully politicized judiciary, is unacceptable. Since discretion and perspective are inherent in judging, Rasmussen ought to accept that these factors exist, suggest their proper scope, and formulate a normative account of how judges should judge. However, he fails to address this synthetic task.

VI. THE AMERICAN LESSON: BORK'S INTERPRETATION

A. Bork's Attack on Judicial Activism

Unlike Rasmussen, Robert Bork does not worry that activism will undermine a court's authority. On the contrary, what concerns him is that "the [Supreme] Court is virtually invulnerable . . . [and] can do what it wishes, and there is almost no way to stop it."¹⁶⁴ As such, judges are free "to impose [their] morality upon us" and reason backwards to

162. For example, the rights not to be killed, robbed, tortured, etc.

163. See, e.g., RASMUSSEN, *supra* note 4, at 28, 390; and his assaults upon such essential landmarks as *Van Gend en Loos*. *Id.* at 26, 30, 31, 37, 51, 147, 201. Rasmussen has not "offer[ed] a systematic, coherent theory of the nature of judicial interpretation" as a substitute. A.G. Toth, Book Review, 7 Y.B. EUR. L. 411, 412 (1987) (reviewing HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* (1986)).

164. BORK, *supra* note 5, at 77. For more comprehensive treatments of Bork's thought in critical context, see, e.g., Ronald M. Dworkin *The Bork Nomination*, 9 CARDOZO L. REV. 101 (1987) (symposium issue on the Bork nomination); and Gary McDowell et al., *The Judicial Record of Judge Robert Bork: A Constitutional Inquiry*, 3 BENCHMARK 119 (1987). For analyses of the course of his thought, see, e.g., Peter Phillips, *A Study of Robert Bork*, 19 ARIZ. ST. L.J. 425 (1987) (includes thorough bibliography and sources); and James Wilson, *Justice Dif-*

achieve desired results.¹⁶⁵ Judges rewrite the Constitution to include "their own subjective sympathies" and "judicially fashionable freedoms."¹⁶⁶ Thus "law is being seduced by politics and thereby losing its integrity as a discipline."¹⁶⁷

Bork argues that the revisionists "prefer results to everything else, including democracy and respect for the legitimacy of authority" and majority rule.¹⁶⁸ They seek to remove policy disputes from the legislative sphere and to solve them through judicial activism. Such judges frustrate majority will, undermine the constitutionally mandated democratic processes, and destroy "the basic American plan: representative democracy."¹⁶⁹ This approach also undermines impartial adjudication, since it encourages reasoning backwards from the desired result instead of deductively proceeding from the neutral principles that the Constitution embodies.¹⁷⁰

The many revisionist theories of constitutional interpretation that purport to constrain judicial discretion ultimately provide no constraints, Bork argues. Moral philosophy is inadequate, since it is based upon personal views rather than objective tests, and no moral philosophy commands a consensus.¹⁷¹ History and tradition are far too broad and varied to confine a judge. Judges can emphasize selectively those elements (whether for liberty or authority) that conform to their personal prejudices and so find bases for almost any result.¹⁷² Bork contends that even if judges were to use these various methods, they lack special training in these disciplines and so are no more competent to arbitrate such issues than are the people speaking through their elected representatives. In short, Bork argues that "[a] robe is entirely irrelevant to the worth or power of one's moral views."¹⁷³

Hence, Bork defends the use of original understanding on grounds of necessity, since he believes it is the only neutral and workable system.¹⁷⁴ The judge thereby avoids engaging in political choices or debates about levels of abstraction, merely applying the choices of the Founders.

fused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative Academic Judges, 40 U. MIAMI L. REV. 913, 943 (1986).

165. BORK, *supra* note 5, at 69-70, 252.

166. *Id.* at 58, 261.

167. *Id.* at 262.

168. *Id.* at 131, 171.

169. *Id.* at 49.

170. *Id.* at 262.

171. *Id.* at 121, 252.

172. *Id.* at 235.

173. *Id.* at 124-25. *Cf. id.* at 190-91.

174. *Id.* at 155.

This method rests upon "what the public of the time would have understood the words to mean" as manifested in the contemporaneous newspapers, debates, dictionaries, and other such sources, as well as in the text and structure of the document itself. In other words, Bork seeks an objective understanding instead of any particular subjective intention.¹⁷⁵

Just as a contract is construed according to the original understanding of the parties, so the Constitution should be read, claims Bork. Though he admits that the Constitution may require a less "narrow, legalistic" reading than ordinary laws, he insists that the basic standard is the same as that for "other legal texts: the original meaning of the words."¹⁷⁶ However, he also believes that "the Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest."¹⁷⁷ Because original understanding is the only fixed understanding superior to that of the judge, Bork proclaims it to be the only method of constraining judicial whims.

He recognizes that "the result of the search [for original understanding] is never perfection; it is simply the best we can do."¹⁷⁸ While he admits that the same principles may be applied to new, unforeseen instances (as with the Fourth Amendment's extension to electronic surveillance) and that judges must develop doctrine in borderline cases, as when no case in point exists, such development differs from creating new constitutional principles.¹⁷⁹ In areas of silence, "judges must stand aside and let current democratic majorities rule, because there is no law superior to theirs."¹⁸⁰

Bork's treatment of the Fourteenth and Ninth Amendments, potential vehicles for fundamental rights jurisprudence, illustrates the ramifications of his method of interpretation. He interprets the Fourteenth Amendment solely according to its presumed purpose of protecting ex-slaves and thus extends it only to cases of racial equality.¹⁸¹ And although the congressional sponsors of the Fourteenth Amendment cited *Corfield v. Coryell*¹⁸² for a broad list of "privileges and immunities,"¹⁸³

175. *Id.* at 144, 165.

176. *Id.* at 145.

177. *Id.* at 147.

178. *Id.* at 163.

179. *Id.* at 167-69 (citing his own opinion in *Ollman v. Evans*, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring)).

180. *Id.* at 167.

181. *Id.* at 180.

182. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D.Pa. 1823) (No. 3,230).

183. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (remarks of Sen. Howard).

Bork brushes that decision aside as "singularly confused."¹⁸⁴ Instead, he applauds the desuetude of the privileges and immunities clause, contending that it ought to remain "a dead letter."¹⁸⁵ Similarly, Bork argues that the Ninth Amendment merely acknowledges state constitutional, statutory, and common-law rights and was meant to ensure that federal rights would not alter the scheme of rights at the state level.¹⁸⁶ After all, he reasons, the Founders foresaw the judiciary as the weakest branch and so would not have enabled it to create new constitutional rights.

Bork views vague areas, such as these Amendments, as the most serious threat to his narrow originalist reading. He responds that judges must ignore overly broad constitutional provisions:

There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it.¹⁸⁷

In many ways, Bork's powerful theory agrees with common sense and makes explicit many of Rasmussen's assumptions. Essentially, both argue that any departure from original understanding enmeshes the judge in policy decisions and turns the courts into an unelected legislature. Both rest crucial arguments upon majoritarianism. While Rasmussen's concern that activist courts will lose legitimacy seems unfounded, Bork's observations about an invulnerable Court and the concomitant political usurpation are far more compelling.

B. Critique of Bork's Theories

Many objections to theories of original intent—such as problems in determining whose subjective intentions should control, discovering whether they intended that their intentions matter, and ascertaining those subjective understandings—do not apply to Bork's version, since he does not rely on subjective intentions.¹⁸⁸ Another criticism comes from skeptics who object that the wishes of the dead cannot bind the

184. BORK, *supra* note 5, at 181 (referring to *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D.Pa. 1823) (No. 3,230), which lists privileges and immunities as encompassing, among others, life, liberty, property, happiness, safety, movement, trade, judicial redress, the franchise, and governmental protection).

185. *Id.* at 166.

186. *Id.* at 184-85.

187. *Id.* at 166.

188. A subjective intention is one which a particular person actually held at a particular time. In contrast, Bork's objective original intent rests upon the way that contemporaries would have understood the document in question.

living. Such arguments, however, provide no reason to extend individual rights. One cannot argue against the Constitution's legitimacy while seeking to extend the document's protections. Neither may objections based on current moral consensus justify judicial activism. If a consensus develops that the Constitution does not go far enough, new rights may be created through amendments or legislation.

Serious problems with Bork's theories of interpretation remain. One difficulty is that discovering the original understanding involves problems of textual sources and reconciling conflicting intentions. "A number of constitutional phrases cannot intelligibly be given content solely on the basis of their language and surrounding legislative history."¹⁸⁹ Many provisions are not only vague, but also ambiguous. Furthermore, when interpreting these provisions, there may be difficulty in fixing levels of abstraction.¹⁹⁰ Often, written words conceal papered-over disagreements.¹⁹¹ The text itself, then, is "just what there was sufficient agreement on to gain majority consent,"¹⁹² and contemporaries clearly held multiple interpretations of the words finally used. This plethora of historical views "may well increase confusion rather than understanding."¹⁹³ Bork might respond by claiming that we should use sufficiently specific intentions where available and otherwise refer matters back to the legislature. To do so, he would still have to step out of his guise of originalist neutrality and argue the merits of majority rule by default versus judicial construction, rather than using the originalist veneer for claiming that his is the only legitimate construction.

Though Bork's views on the Fourteenth Amendment at first seem to tally with its logic and history, his reading ignores the broad import of the words. The drafters of that provision could have tailored it very nar-

189. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 12 (1980). Ely also claims that "the document itself and a 'framers' dictionary' " will not suffice. *Id.* at 13.

190. Paul Brest, *The Fundamental Rights Controversy: Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1092 (1988), gives as an example "the general principle of equality which applies to all cases" (a principle Bork had articulated in Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14-15 (1971)). Brest notes that one could read this principle as one of equality for blacks only, racial equality, or a general equality embracing such classifications as gender and sexual orientation.

191. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 105 (2d ed. 1986).

192. ELY, *supra* note 189, at 17.

193. RICHARD EPSTEIN, *TAKINGS* 27 (1985). On the contrary, the Founders were highly wary of majoritarianism and sought to avoid leaving lots of powers to the majority; hence the Congress's powers in the Constitution are more limited than those of the other two branches: "All legislative powers herein granted shall be vested in a Congress . . ." U.S. CONST. art. I, § 1. (emphasis added). See also *infra* note 200 and accompanying text.

rowly had they wanted to.¹⁹⁴ Nonetheless, Bork strives to use some history to narrow it himself. He shows his use of original understanding to be selective when he dismisses *Corfield v. Coryell* and treats the privileges and immunities clause as a "dead letter." His construction of the Ninth Amendment is similarly illogical because it renders the Amendment completely irrelevant to both federal and state governments and duplicative of the Tenth Amendment's reservation of state autonomy. One scholar, Randy E. Barnett, has proposed a far more plausible reading rooted in "the then-prevailing beliefs in rights antecedent to government."¹⁹⁵ These rights would limit the government's permissible ends and means, either as rights drawn from constitutional history and philosophy, or more usefully as "a general constitutional presumption in favor of individual liberty."¹⁹⁶

Open-ended sections like the Ninth and Fourteenth Amendments indicate that the Constitution cannot be limited by narrow originalist reasoning. As John Hart Ely has remarked, "the Constitution turns out to contain provisions instructing us to look beyond their four cor-

194. For an example of wording tailored to a particular group, see U.S. CONSTITUTION art. I, § 2, cl. 3, which "exclud[es] Indians not taxed."

195. Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 13 (Randy E. Barnett ed., 1989). Barnett also notes that the Ninth Amendment's desuetude is no reason to ignore it; after all, no Congressional statute had been struck down on First Amendment grounds until 1965. *Id.* at 28 n.79 (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965)).

196. *Id.* at 13, 35-44. One reply Bork could make is that, since no one believes in natural rights any more, claims of "rights retained by the people" still degenerate into subjective moral sympathies. But this step would require him to selectively denigrate one portion of original understanding and so undermine the supposed unique neutral integrity of his theory (for "natural rights" are no ink blots; we can ascertain their content as understood by the Framers in light of the Enlightenment philosophers). Furthermore, the burden is then upon him to show that rights of life, liberty, property, happiness, and the like are no longer believed in. But while, at first, some people may deny the existence of rights, on deeper inspection these same people will protest that one ought not torture or kill the innocent, not because these things have no utility but because it is wrong to do it to a human. Further, contrary to Ely's suggestion that a provision embodying natural rights is like a provision protecting ghosts and so ought to be ignored, Ely, *supra* note 189, at 18, Randy Barnett argues that, even if one is a philosophical skeptic, rights are a sort of embedded mistake which can retain specific force as part of a constitutional framework even if the beliefs behind them have faded. Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 28 n.92 (1988).

Also, reading them out of the Constitution would skew the governmental balance and safeguards so carefully set up in the Constitution. See Barnett, *supra* note 195, at 34. To extend the structural argument, one may view rights in purely practical terms as a way of checking legislative majorities. See *infra* note 202 and accompanying text. The insulation of judges can enable them to act as a kind of Burkean historical filter (since the judicial power is in essence negative and acts as a veto upon laws). If Bork were truly faithful to originalism, he would welcome this restraint upon majority will.

ners.”¹⁹⁷ The English experience had taught the Founders that law is not limited to written legislation. Alexander Hamilton, speaking for most of his contemporaries, observed that “[i]n disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend,” such as the rule that “the means ought to be proportioned to the end.”¹⁹⁸ Even if not codified, these principles underlie our legal system.¹⁹⁹ Hence, originalism does not provide Bork with a complete, self-contained method of interpretation.

Contrary to Bork’s assertion, the Constitution has not been drenched with ink. As already noted, textual and historical meanings adhere to the privileges and immunities clause and to the Ninth Amendment. The text, its structure and history, and the aims of government inform us of possible interpretations. Bork’s real reason for denigrating certain provisions seems not to be difficulty in translating “Sanskrit” but an arbitrary preference for leaving most matters to majority will. Hence, he ignores or seeks to delete anti-majoritarian constitutional provisions like the Ninth and Fourteenth Amendments.

Ironically, original intent does not seem to support this majoritarian preference. The Founders did not embrace democracy and majority rule eagerly. In upholding inalienable rights, they sought to limit the tyranny of the majority over minorities. They saw the danger of “an interested and over-bearing majority” trampling upon “the rules of justice, and the rights of the minor party,” especially property rights.²⁰⁰ While people may recognize the demands of justice in the abstract, they often pass “unjust and partial laws”²⁰¹ in pursuing their immediate self-interest. Judges, given their impartial deliberation, ought to “mitigat[e] the severity and confin[e] the operation of such laws.”²⁰² Judges who occasionally

197. ELY, *supra* note 189, at 38.

198. THE FEDERALIST No. 31, at 147 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987) (note the similarity to the E.C.J.’s acceptance of proportionality). See also James Wilson (one of the first U.S. Supreme Court Justices), I THE WORKS OF JAMES WILSON, 64, 66, 107 (natural law), 256, 274-75 (first principles based on common sense and reason), 263 (skepticism is self-destructive) (1804); II THE WORKS OF JAMES WILSON, 453 (natural rights), 466 (safeguarding natural rights is the principal object of any legitimate government).

199. See, e.g., LON L. FULLER, THE MORALITY OF LAW 51 (2d ed. 1969). Since the Constitution does not include the requirement of proportionality, on Bork’s reading we must either a) claim that it does not exist and allow factions to enact disproportionate legislation, or b) find it to be an unwritten presupposition: but once we find such a presupposition, other presuppositions of rights must be admitted to the Ninth Amendment. For a discussion of the uncodifiability of such rules, see *supra* note 138 and accompanying text.

200. THE FEDERALIST No. 10 (James Madison), *supra* note 198, at 41, 43 (citing debtor relief laws, etc.).

201. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 198, at 401.

202. *Id.* Bork’s only reply is that the Founders could not possibly have meant to turn over

defy majority will to defend oppressed minorities obey their higher calling as envisioned by the Founders. Bork's majoritarianism is grounded not in history but in ideological prejudice.

Even if Bork's use of history were not selective and colored by his blind faith in majority rule, he could not escape the specter of discretion. First, although he claims that a judge can be neutral by applying choices already made for him, Bork, in reading the text narrowly, has made a political choice. As Richard Posner has recognized, "[R]eading is not a form of deduction; understanding requires a consideration of consequences. . . . Even the decision to read the Constitution narrowly, and thereby 'restrain' judicial interpretation, is not a decision that can be read directly from the text."²⁰³ Bork has affirmatively chosen originalism and must defend it on its merits; he cannot treat his choice as uniquely apolitical. Second, "all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral."²⁰⁴

Certainly, there have been isolated instances of overly political judging. But using this complaint to argue for eliminating all judicial discretion is an illogical version of the slippery slope argument, an absurd *reductio ad absurdum*.

The solution is not to search for the Holy Grail of unattainable mechanical jurisprudence but to recognize the ultimate end or purpose (*telos*) of our government and to adjudicate with those principles in mind. For instance, the Declaration of Independence and the Preamble to the Constitution both outline a broad vision of government which ought to enlighten interpretation. Another originalist, Lino Graglia, nevertheless has dismissed the Preamble as a "rhetorical flourish."²⁰⁵

large amounts of power to judges. He seems to forget that the judicial power is merely negative and reactive. So long as government stays fairly limited and within the bounds of powers set out, as was true of the early government, there is no need for vigorous judicial enforcement. Once the government's sphere of operations grows, increasing judicial scrutiny serves to maintain the balance of powers. See Barnett, *supra* note 195, at 27-29.

203. Richard A. Posner, *What Am I? A Potted Plant?* THE NEW REPUBLIC, Sept. 28, 1987, at 24. He adds that "[t]he Constitution does not say, 'read me broadly' or 'read me narrowly.'" *Id.* at 24-25. Other considerations must inevitably come into play.

204. Brest, *supra* note 190, at 1091-92; accord Laurence Tribe & Michael Dorf, *Levels of Generality in Constitutional Law*, 57 U. CHI. L. REV. 1057 (1991). Bork wonders why there is so much theoretical debate about how to approach the Constitution. BORK, *supra* note 5, at 133. The very plasticity and ambiguity of the text demand the kinds of hard choices to which Bork is oblivious. What Bork has actually done is assumed without argument that everyone ought to share the same majoritarian assumptions that he does. His case may indeed be defensible on other grounds but is untenable on originalist grounds.

205. Lino A. Graglia, *Would the Court Get 'Procedural Due Process' Cases Right If It Knew What 'Liberty' Really Means?* 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 813, 815 (1985). As

Originalists reject such guidelines because they do not like the potential results. Bork asserts, "The Constitution states its principles in majestic generalities that *we know* cannot be taken as sweepingly as the words alone might suggest."²⁰⁶ What "we know," like Bork's ink-blot theory, becomes a way to ignore inconvenient sections: opening statements of principle, the Ninth Amendment, and parts of the Fourteenth Amendment.

VII. IN DEFENSE OF JUDICIAL SCRUTINY: A PURPOSIVE THEORY OF INTERPRETATION

Bork and Rasmussen essentially view constitutions as contracts the interpretation of which should be limited to the express wording and the views of contemporary parties. But, as pointed out earlier, constitutions are meant to be timeless and must be read in a more liberal fashion. As Bickel notes, constitutional "construction involves hospitality to large purposes, not merely textual exegesis."²⁰⁷ In adjudication, rights and the demands of justice also should enter into play. A judge's "own convictions about justice or wise policy are constrained by his overall interpretive judgment, not only by the text of the statute but also by a variety of considerations of fairness and integrity."²⁰⁸

The solution to illuminating the purposes of constitutions while avoiding subjective judging is to employ principled judicial scrutiny based upon individual rights and liberties.²⁰⁹ The purpose of government is to protect and serve individual citizens. Even Robert Bork once advocated such an approach; he suggested that a "legitimate judicial activism" would give "content to the concept of natural rights in a case-by-case interpretation of the Constitution."²¹⁰

Any method of textual interpretation depends upon judges of integrity who act in good faith. A judge bent on achieving a set result can

Charles Murray notes, the phrase "the pursuit of happiness" in the Declaration of Independence was not "a rhetorical flourish to round out the clause. . . . [I]t was obvious to [the Founders] that the pursuit of happiness is at the center of man's existence, and that to permit man to pursue happiness is the central justification of government." CHARLES MURRAY, *IN PURSUIT: OF HAPPINESS AND GOOD GOVERNMENT* 24 (1988) (citing *THE FEDERALIST* No. 62 (James Madison)).

206. BORK, *supra* note 5, at 147 (emphasis added).

207. BICKEL, *supra*, note 191, at 36.

208. DWORKIN, *supra* note 155, at 380.

209. For a good *précis* and defense of principled judicial activism, see, e.g., STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (2d ed. 1987).

210. Robert H. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec. 1968 at 138, 170.

twist even originalism—for instance, Bork's reading of the privileges and immunities clause. Certain matters clearly fall within the public sphere,²¹¹ and governments must be able to act in ways that displease some people. But when these actions interfere with individual autonomy, the courts should apply critical scrutiny to ensure that a compelling governmental objective justifies the measure.

While constitutions may include majority rule, one ought not to view majoritarianism as an overriding universal principle. Numerical superiority does not equal complete license to dominate others. As long as we value individuals, some spheres must be reserved for individual autonomy, and the scope of such spheres must be defined by a body "not [beholden] to the views of a local or transient political majority."²¹²

This function belongs to judges. "Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the hue and cry" of a self-interested legislative fracas.²¹³ The courts thus remind us of shared principles, such as freedoms of speech and of assembly, which we momentarily may lose sight of, as when an unpopular group wishes to hold a demonstration.

They should do so without discriminating against unfashionable rights. As noted, the ECJ has not differentiated standards among liberties. Bork rightfully complains of the meager protection afforded to economic rights relative to other human rights.²¹⁴ Courts ought not enforce liberties selectively but should instead scrutinize all alleged violations and protect all rights in a principled, uniform fashion.

Judges ought to base their decisions on the principles underlying the constitutional system. Despite many differences, most of us in the Western tradition share "allegiance to a limited number of broad first principles concerning the ends of government."²¹⁵ Bork used to acknowledge that "our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment," but he leaped from there to a *non sequitur*: "they do not rest upon any general theory."²¹⁶ Our history and morality teach us that, as a general rule, individuals have

211. One could argue that almost any legislative measure touches upon a public sphere. But courts should scrutinize the genuineness and actual weight of the alleged public interest; otherwise, any legislation could claim a fictitious public interest and so pass scrutiny.

212. DWORKIN, *supra* note 155, at 377.

213. BICKEL, *supra* note 191, at 26.

214. BORK, *supra* note 5, at 61-62.

215. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 142 (1975).

216. ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 8 (1984) (pamphlet in the Francis Boyer Lectures on Public Policy).

rights and ought to be respected. They must be treated as ends in themselves and not merely means. Respect for individual rights underpins our Enlightenment heritage and our form of government.

Critics might attack this approach and claim that, in a fragmented, heterogeneous society, no monolithic heritage exists. Our society often seems fragmented and lacking consensus, but our common principles become apparent when we contrast our values with those of a radically different culture. Bork's practical skepticism on this count ought not make us shrink from seeking fundamental principles. Judges can and do vote for results which they personally abhor.²¹⁷ Rather than causing us to abandon the enterprise completely, Bork's warning should caution us to beware of our prejudices in using history, tradition, and philosophy.

The judiciary also serves as an additional counterweight to legislative expansion unforseen by the Founders; its protection of rights can function as a second line of defense against expanding government power. In a limited government, judicial review would not be very important, but, as centralization increases, the courts can serve as an effective watchdog. As Mauro Cappelletti notes in observing the EC, "the ever increasing powers of the legislative and executive branches justify, indeed demand, a parallel growth of the judicial power to preserve a balanced system. This is an inevitable tenet of 'checks and balances.'" ²¹⁸ Hence, as EC union has increased, the ECJ concomitantly has had to step up its scrutiny of the exercise of centralized powers.

Because of their indirect relation to the political branches, the courts may distill general principles without immediate political fear. While courts are insulated, they are still a part of the government, and the Constitution is superior to the entire government. Paradoxically, impartial adjudication may flourish because the other parts of government retain extreme checks upon the courts (such as impeachment, constitutional amendment, and possible removal of appellate jurisdiction under Article III, Section 2 of the Constitution in the U.S. and Member State backlash in the EC).²¹⁹ Because such measures exist yet are rarely used, the courts

217. See, e.g., *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (Frankfurter, J., dissenting). As a Jew, Frankfurter personally abhorred the law in question but felt that Constitutional principles bound him to uphold it. While Frankfurter's legal reasoning is questionable, his vigorous dissent proves that, though they may not be perfect at doing so, judges can, with some success, strive to disassociate personal policy views from legal views.

218. Cappelletti, *supra* note 2, at 23.

219. Note that several Supreme Court decisions have been overturned by constitutional amendments. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (overturned by the Eleventh Amendment); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (overturned by the Reconstruction Amendments); *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601

are, within reason, free from immediate political pressures and can reflect society's deeper moral principles. They will of course make unpopular decisions, but so will legislators. Furthermore, the powers of appointment, advice, and consent can ensure that judges have records of integrity, brilliant intellect, and thoughtfulness. Occasional flaws in the process may reflect the infirmities of the legislative and executive branches in carrying out their appointment functions; if so, this is certainly no argument for returning power to those branches.²²⁰

VIII. CONCLUSION

The outlook for the European Court of Justice is bright. Filled with national jurists of first-rate intellect and reputation, the ECJ has contributed to the survival and flourishing of the fledgling European Community. It has worked closely with the national courts in handling preliminary references while asserting its supreme jurisdiction when circumstances have demanded it. It has also made use of the diverse traditions of the Member States, thereby reaping the benefits of legal pluralism and weaving all of the national strands into a rich international tapestry. Consequently, it has received plaudits from both commentators and the rest of the EC, and obedience and cooperation from the national courts.²²¹

As political integration looms, much hinges on the desires of the Member States as expressed in the European Political Cooperation arena set up by the Single European Act.²²² Because of linguistic and cultural differences, the European states will likely retain far more national autonomy than did the American states. In the U.S., the Fourteenth Amendment proved critical to many decisions allowing national en-

(1895) (overturned by the Sixteenth Amendment); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (overturned by the Twenty-Sixth Amendment).

220. Some academics criticize the history of judicial appointments in America, but for every bad political selection there have been scores, if not hundreds, of highly qualified jurists appointed. The Senate confirmation process, combined with the ABA rating system, generally weeds out the bad eggs; similarly, the EC has selected notable legal minds for the E.C.J.. Those who criticize the flaws of the selection process refer to the *politicization* of that process occasioned by the contentious nomination of Robert Bork himself. In the life of a great Court, we must defer judgment to the long term. It is doubtful that the absurd and extreme politicization of the Court will not endure. Moreover, if Bork wishes to leave such issues to the majority, one could argue that this very infrequent politicization amounts to majority rule on those issues not commanding any semblance of a consensus.

221. See Joint Declaration, *supra* note 71, and *In Re: The Application of Wünsche Handelsgesellschaft*, 50 C.M.L.R. 225, 265 (BGH 1987)(Germany).

222. European Political Cooperation is the name given to the regular meetings and informational exchanges of the twelve Member States.

croachments upon state powers. Since no counterpart to the American Civil War—viewed as the defeat of states' rights²²³—seems likely in Europe, the prospect of an EC "Fourteenth Amendment" seems dim. But just as the Commerce Clause permitted many New Deal programs to restrict state autonomy,²²⁴ we may expect that the economic autonomy of the Member States will continue to diminish.

The ECJ will continue its *Griswold*-like distillation of rights.²²⁵ And, finally, the people of Europe will undoubtedly demand that, as EC power grows, the directly elected European Parliament be given a far larger role than the token one it now holds.²²⁶

The ECJ's derivation of human rights and general principles shows how a principled judicial activism, based in law, history, and morality, can fill a deeply felt gap in a legal system. And like the ECJ, the U.S. Supreme Court has pursued with great success the ends set out for our government. Both courts have sought to protect individuals, although one would hope that the U.S. Supreme Court will follow the ECJ's lead in protecting all such rights consistently.

Bork and Rasmussen have offered criticisms which are ultimately unpersuasive. They share unrealistic ideas of how courts should operate and ignore the virtues of an insulated counterweight to majority rule. This Comment has viewed the systems side by side in an attempt to highlight the creative and purposive nature of adjudication and to undermine the myth of original understanding. In its place, we must view judging in light of the constitutional text, its structure, and its overarching purposes. And judges, detached from the political hurly-burly and capable of taking a longer-term perspective, can best assure the respect for the individual which is so vital to a healthy society.

223. Confederate political philosophy rested upon "the absolute sovereignty of the states." RICHMOND ENQUIRER, Jan. 28, 1863, March 19, 1863, cited in Warren, *supra* note 94, at 187.

224. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

225. One can only wonder how the E.C.J. would react to an Advocate General's drawing an American parallel to illustrate the use of a method or principle such as this one.

226. In response to these unpopular demands, the current Intergovernmental Conferences (on reforming the EC) are debating expanding the Parliament's role. A substantial number of Member States favor such a change. Letter from Alyssa A. Grikscheit to Steven A. Bibas 3 (Aug. 24, 1991) (on file with the author).

